

No. 14806

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United States  
Court of Appeals  
For the Ninth Circuit.

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AMERICAN PACIFIC DAIRY PRODUCTS,  
INC.,

Appellant,

vs.

PACIFIC ENTERPRISES, INC., a Corporation,

Appellee.

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Transcript of Record

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Appeal from the District Court  
for the District of Guam,  
Territory of Guam.

FILED

NOV 18 1955

PAUL P. O'BRIEN, CLERK

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**Court of Appeals**  
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**for the District of Guam,**  
**Territory of Guam.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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For the Appellant.

JOHN A. BOHN, ESQ.,

P. O. Box 771,  
Agana, Guam.;

WALTER S. FERENZ,

903 First St.,  
Benicia, California,

For the Appellee.



In the District Court of Guam  
In and for the Territory of Guam

Civil Case No. 68-54

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC., and JOSEPH SICILIANO, Co-Partners  
Doing Business Under the Firm Name and  
Style of DAIRY QUEEN OF GUAM,

Defendants.

### COMPLAINT

The Plaintiff complains of the Defendant and for cause of action alleges:

#### I.

That the Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the Territory of Guam.

#### II.

That the demand herein exclusive of interest and costs amounts to more than Two Thousand Dollars (\$2,000.00) and that the court has jurisdiction under Section 62 of the Code of Civil Procedure of Guam.

#### III.

That the Defendant owes the Plaintiff the sum of Thirteen Thousand, Eight Hundred Seventy Dollars and Forty-Eight Cents (\$13,870.48) according to the account hereto annexed as Exhibit "A."

Wherefore, Plaintiff demands judgment against the defendants for the sum of Thirteen Thousand, Eight Hundred Seventy Dollars and Forty-Eight Cents (\$13,870.48) together with interest thereon and costs and for such other relief as to the court shall deem meet.

/s/ JOHN A. BOHN,  
Attorney for Plaintiff.

/s/ ROBERT E. DUFFY,  
Resident Counsel.

### EXHIBIT "A"

Pacific Enterprises, Inc.  
P. O. Box 338  
Tamuning, Guam, M. I.

#### Statement

March 31, 1954.

To: American Dairy Products, Inc.,  
Anigua, Guam, M. I.

Balance forward, as of July, 1953 .....		\$12,607.13
Additional Charges:		
Schedule—I .....	\$ 975.85	
Schedule—II .....	67.30	
Primitivo de Aquino Differential Pay ..	90.00	
Employees Clearances .....	130.20	1,263.35
	<hr/>	<hr/>
Total .....		\$13,870.48
		<hr/> <hr/>

## Exhibit "A"—(Continued)

August 1, 1953.

To: American Dairy Products, Inc.,  
Anigua, Guam, M. I.

Incurred from 22 June, 1952, to 31 July, 1953

I.	Subsistence .....	\$ 2,031.30
II.	Housing facilities .....	398.00
III.	Transportation .....	600.00
IV.	Rent for reefer truck .....	1,012.50
V.	For hauling supplies .....	146.25
VI.	Deliveries of supplies to Dairy Queen .....	146.25
VII.	For storage of supplies .....	361.70
VIII.	For freezing .....	77.00
IX.	For maintenance .....	616.07
X.	Supplies issued to Dairy Queen, Pacific Enterprises' own stock ..	160.02
XI.	Other expenses .....	24.11
XII.	Equipments owned by Pacific En- terprises, Inc. ....	771.60
XIII.	Other salaries .....	3,966.65

## Cost of Additional Store:

I.	Labor .....	1,433.44
II.	Materials used .....	1,928.52

<b>Total amount owing us .....</b>	<b>\$13,673.41</b>
Less: Mdsc. bought from Dairy Queen .....	1,066.28

Balance due us, end of July, 1953 .....	<u><u>\$12,607.13</u></u>
---	---------------------------

## Exhibit "A"—(Continued)

Expenses to Be Accounted for and Reimbursed to  
Pacific Enterprises, Inc.

From: Pacific Enterprises, Inc.,  
P. O. Box 338, Agana,  
Guam, M. I.

To: American Pacific Dairy Products, Inc.,  
Anigua, Guam, M. I.  
Incurred from June 22, 1952, to July 31, 1953

## I. Subsistence:

(From June 22, 1952, to Oct. 31, 1952, 130 days):

For: 1. Tony Toquero at \$1.45/head/day, for (3) \$ 565.80  
2. Wilfredo Pisuena  
3. Teofilo Ceraos

(From Nov. 1, 1952, to Jan. 31, 1953, 92 days):

For: 1. Tony Toquero at \$1.45/head/day ..... 400.20  
2. Wilfredo Pisuena  
3. Feliciano Rapiz

(From Feb. 1, 1953, to July 31, 1953, 182 days):

For: 1. Tony Toquero at \$1.45/head/day ..... 1,055.60  
2. Wilfredo Pisuena  
3. Feliciano Rapiz  
4. Premitivo de Aquino

## II. Housing for above employees:

(From June 22, 1952, to July 31, 1953):

At \$3.00/month (for 13 months and 8 days) ..... 398.00

## III. Transportation:

Roundtrip ticket, for (3) at \$200.00 ..... 600.00

## IV. Rent for reefer truck:

(From June 22, 1952, to July 31, 1953, 405 days):

Storage for pints and quarts (ice cream) at  
\$2.50/day ..... 1,012.50

## V. For hauling supplies:

(From Commercial Dock to P.E.I. Warehouse,  
Tamuning):

Extracted from only available stock record, P.E.I.  
Total wts. of supplies hauled in—117,198 lbs.  
or (58½ tons) at the rate of \$2.50/ton ..... 146.25

Exhibit "A"—(Continued)

VI. Deliveries of supplies to Dairy Queen:		
From P.E.I. Warehouse, Tammuning, to Dairy Queen's Store at the rate of \$2.50/ton .....		146.25
VII. For storage of supplies:		
Warehouse and air-conditioned storage—at \$35.00 per month or \$1.70/day (includes storekeeper's salary—from June 22, 1952, to April 2, 1952, 10 months and 8 days) .....		361.70
VIII. For Freezing:		
Frozen strawberries at \$7.50/month from June 22, 1952, to April, 1953 (10 months and 8 days) .....		77.00
IX. For maintenance:		
1. Electrician, \$1.082/hr., 70 hrs. ....		75.74
2. Reefer mech. "A," \$1.444/hr., 3 hrs. ....		4.33
3. Reefer mech. "B," \$1.444/hr., 196 hrs. ....		283.00
4. Garbage hauler, \$1.00/day, 253 hrs. ....		253.00
X. Supplies issued to Dairy Queen from Pacific Enterprises' own stock:		
Qty.	Description	Unit Price
1 gal.	Grounded nuts, \$3.00/gal. ....	3.00
2 gals.	Imitation vanilla flavoring, \$1.43/gal. ....	2.86
5 rolls	Mulch paper, 16x36, \$3.80/roll .....	19.00
12 pes.	Plywood, 4x8x1/4, \$6.50/pe. ....	78.00
2 ea.	Scoop "Sugar," 2 lbs., \$1.50/ea. ....	3.00
2 cans	DDT, 10 lbs., ea., 98c/can .....	1.96
2 ea.	Brooms, light, \$1.75/ea. ....	3.50
94 cans	Old Dutch Cleanser—48/es., \$5.85/cas. ....	11.47
200 lbs.	Granulated sugar, 11c/lb. ....	22.00
1/2 gal.	Clorox, 50c/qt. ....	2.00
200 ea.	Lily Cups, 8 oz. size, \$1.121/4/100 .....	2.23
4 boxes	Eagle straws, 81/2-inch, \$1.50/box .....	6.00
XI. Other expenses:		
Lacquer, dark paint, 1 gal. ....		5.45
6 60-watt bulbs .....		.66
2 loads crushed corals (used in leveling front lot of store), \$9.00/load .....		18.00

## Exhibit "A"—(Continued)

## XII. Equipments owned by Pacific Enterprises, Inc.:

1-ca.	3/4 hp motor (Westinghouse) .....	70.00
1-ca.	Hot fudge heater .....	101.00
2-ca.	Universal condenser .....	25.00
2-ca.	Blower .....	45.60
1-ca.	Air cooler evaporator .....	150.00
2-ca.	Electric fans .....	30.00
1-ca.	Deep freeze 1hp .....	300.00
1-ca.	Carrier compressor, installed to walk-in reefer .....	50.00

## XIII. Other salaries:

1.	E. O. Diza (commencing from June 22, 1952, to March, 1953) .....	1,423.61
2.	G. C. Balmonte .....	90.97
3.	W. L. Veit .....	439.93
4.	J. Meggo .....	2,012.14

Cost of Additional Store to D. Q.'s Former Bldg.

From: Pacific Enterprises, Inc.

P. O. Box 338, Agana,  
Guam, M. I.

To: American Dairy Products, Inc.,

Anigua, Guam, M. I.

(Completed in 40 days period, commencing July 1, 1952)

## I. Labor—Direct:

1.	Simeon Bandong, 40 days at \$4.167/day .....	\$ 166.68
2.	Mariano Vinoya, 40 days at \$4.167/day .....	166.68
3.	Celestino Vinoya, 40 days at \$3.334/day .....	133.36
4.	E. Sibonga, 40 days at \$4.167/day .....	166.68

## Labor—Indirect:

1.	A. Padua, foreman, 40 days at \$11.667/day .....	466.68
2.	P. Irapta, asst. foreman, 40 days at \$8.334/day .....	333.36



## Exhibit "A"—(Continued)

## II. Materials used:

Wood for roofing support, 65.33 bd. ft. at 17c bd. ft. ....	11.11
Plywood, 4x1/4, 27-ea. at \$6.50 ea. ....	175.50
Solid door, 1-ea. ....	12.50
Cellotex, 8-pes. at \$2.00 ea. ....	16.00
Panel-sidings, 3'10"x6'6", 6-ea. at \$50.00 ea. ....	300.00
Panel (unit), 3'10"x6'6", 2-ea. at \$15.00 ea. ....	30.00
Screen door, 2-ea. at \$4.50 ea. ....	9.00
Septic tank .....	800.00
PCC Invoices (see Schedule "A" attached) .....	138.32
Calvo Invoices (see Schedule "B" attached) .....	52.65
Pedros Invoices (1 gal. aniteEnamel paint, at- tached) .....	5.50
Marsport Invoices (see Schedule "C" attached) ..	127.69
Crushed coral, 3 loads, (see Schedule "D" at- tached) .....	27.00
Bags cement, 95-ea. ....	223.25

## Explanation, Item I—Subsistence:

(a) per head/day, \$1.45

Breakfast .....	\$0.35
Lunch .....	.50
Dinner .....	.60

## Explanation, Item V—For hauling supplies:

Per P.E.I. store-room available record on goods hauled-in,  
for Dairy Queen:

- All cases "toppings," except "marshallow," estimated at 50 lbs./cs. marshallow at 31 lbs./cs.:
  - Total number of cases at 50 lbs., 365—18,250 lbs.
  - Total number of cases at 31 lbs., 8—248 lbs.
- All ice cream mixes, estimated at 772 lbs./drum except of 1952, which is estimated at 300 lbs./drum:
  - Number of drums at 300 lbs., 84—25,200 lbs.
  - Number of drums at 275 lbs., 247—67,925 lbs.
  - Number of drums at 125 lbs., 5—625 lbs.
 (Deviluxe)

## Exhibit "A"—(Continued)

3. All can. frozen strawberry at 30 lbs./can, 165 cans—4,950 lbs.:

Total wts., 2,000—1 ton, 117,198 lbs. or 58 $\frac{1}{4}$  tons, at \$2.50/ton—(\$146.25).

Note: All supplies hauled-in, such as jiffy bags, other bags, cones, cups, spoons, etc., expense on said items has not been accounted for in this report.

Explanation, Item VI—Deliveries of supplies to Dairy Queen store; (from warehouse at Tamuning):

Total wts. of Item V, has been conformed to same rate for 58 $\frac{1}{2}$  tons—supplies at \$2.50/ton—(\$146.25).

Explanation, Item XIII—Other salaries:

1. E. O. Diza, for keeping books of Dairy Queen, commencing June 22, 1952, to March 31, 1953, (for 3 hrs./day at \$1.683/hr.). Period covered—9 months and 8 days. Total hours—846—(\$1,423.61).
2. G. C. Balmonte, for working night-time at Dairy Queen 2 weeks in August, 1952, from 6 p.m. to 12 midnight and 1 week in September, 1952, replaced T. Ceraos during sickness. Total hours—126 at .733c/hr.—(\$90.97).
3. Mr. W. L. Veit, for 2 months administration from September to October, approximately 3 hours per day at \$2.404/hr.—(\$439.93).
4. Mr. J. Meggo, for changing banks and taking the readings daily and extra work of 2 hours in the store daily. Period covered, from June 22, 1952, to March, 1953. Fixed hours consumed—3 hrs./day, and to include time for hauling supplies for Dairy Queen. Total hours at \$2.404/hr. (Note: Meggo's work to end March 27, 1953) (\$2,012.14).

## Exhibit "A"—(Continued)

## Schedule "A"

Explanation, Item II—

Bulletin red paint, 1 pt. ....	\$ 1.07
Indian red, 1 pt. ....	1.07
Trulike white paint, 1 gal. ....	5.76
Coloring, dark yellow, 1 gal. ....	1.25
Paint brush, 1 ea. ....	.85
Cabinet pall, 4 ea. ....	2.60
Paint thinner, 1 gal. ....	.95
Colorizer, paint white, 1 gal. ....	5.76
Enamel, dark, 1 gal. ....	6.05
100 per cent pure white paint, 2 gals. ....	11.52
Bar top varnish, 1 qt. ....	1.52
Chromium metal moulding, 24 ft. at 22c ....	5.28
1x1 brass hinges, 7 pairs at 15c ....	1.05
Corner brass, 2 pes. at 15c ....	.30
Brass screws, 4 doz. at 10c ....	.40
1/4 round wire, 50 ft. at 5c ....	2.50
Gate valve, 2 ea. at \$3.55 ....	7.10
Enamel paint, 2 gals. at \$7.58 ....	13.05
Bungalow paint, 3 gals at \$3.00 ....	9.00
Interior gross, 2 gals. at \$5.76 ....	11.52
Paint thinner, 2 gals. at 95c ....	1.90
Hack saw blade, 12 ea. at 15c ....	1.80
Flush tungzel switch, single pole, 2 ea. at 35c ....	.70
Friction tape, 6 ea. at 70c ....	4.20
Gross iron wood screws, 1 ea. ....	1.20
Bungalow paint, 5 gals. at \$2.90 ....	14.50
Bungalow paint, 3 gals. at \$3.00 ....	9.00
Boneplelack colors, 2 cans at 53c ....	1.06
Ultra-blue, 3 cans at 75c ....	2.85
Paint deluxe, 1 cs. ....	1.29
Turpentine, 1 gal. ....	3.00
Paint thinner, 3 gals. at 95c ....	2.85
2x12/x14 wood, 1 pc. at 18c ....	5.04
Paint brush, 1 ea. ....	1.10
Royal blue paint, 3 qts. at \$2.40 ....	7.20
Sandpaper, 24 ea. at 3c ....	.72

## Exhibit "A"—(Continued)

Plastic wood, 1 ea. at 40c .....	.40
1-inch hinges, 4 pairs at 15c .....	.60
Drawers pull, 2 ea. at 25c .....	.50
Drawers pull, 2 ea. at 65c .....	1.30
<hr/>	
Total amount .....	\$ 148.81
Less: Discount .....	11.49
<hr/>	
Balance of amount .....	\$ 138.32

## Schedule A-1

## Additional charges:

A) Subsistence, adjustment .....	\$ 975.85
1. Tony Toquero .....	\$ 274.05
\$1.45/head/day, from August 1, 1953, to February 5, 1954, (189 days).	
2. W. Pisuena .....	350.90
\$1.45/head/day, from August 1, 1953, to March 31, 1954, (242 days).	
3. F. Rapiz .....	350.90
\$1.45/head/day, from August 1, 1953, to March 31, 1954, (242 days).	
B) Housing, adjustment .....	67.30
1. Tony Toquero .....	18.90
\$3.00/mo., (6 mo. & 9 days).	
2. F. Rapiz .....	24.20
\$3.00/mo., (8 mo. & 2 days).	
3. W. Pisuena .....	24.20
\$3.00/mo. (8 mo. & 2 days).	

## Exhibit "A"—(Continued)

## C) Salary, differential:

P. de Aquino: Base pay should be \$75.00—previous salary drawn at \$60.00/mo. only—Difference (\$15) (period from Feb. 1 to July 31, 1953).

D) Charges on employees clearances ....		130.20
1. F. Rapiz .....	51.35	
For: a) Passport .....	\$27.50	
b) N.B.I. ....	1.25	
c) Visa .....	10.10	
d) Police clear. ..	5.00	
e) Tax clear. ....	7.50	51.35
2. W. Pisuená (same as above) ....	51.35	
3. Tony Toquero .....	27.50	
For: Passport .....	\$27.50	

## Schedule "B"

## Explanation, Item II:

Ball-cock-lacquer (handle only), 1 ea. ....	\$	1.25
Bushing, 1½x¾", 1 ea. ....		.40
Galvanized pipe, ¾", 24 ea. ....		10.50
Gate valve, ¾", 1 ea. ....		2.75
Gate valve, ½", 2 ea. ....		4.00
Bushing, ¾x½", 2 ea. ....		.40
Tie, ¾", 1 ea. ....		.40
Union, ¾", 1 ea. ....		.80
Union, ½", 1 ea. ....		.75
Nipples, ½ close, 1 ea. ....		.10
Tee, 2", 1 ea. ....		1.50
Tee, 17x¾x10", 1 ea. ....		1.05
Gate valve, ¾", 2 ea. ....		5.50
L. galv. pipe, ¾", 3 ea. ....		15.00
L. pipe, ¾", 1 ea. ....		5.25
Tee, ¾", 1 ea. ....		.76

## Schedule "B"—(Continued)

Union, $\frac{3}{4}$ " , 2 ea. ....	1.50
Galv. pipe, $\frac{3}{4}$ " , $\frac{1}{2}$ length .....	2.68
90° elbow, $\frac{3}{4}$ " , 3 ea. ....	.75
Tee, $\frac{3}{4}$ " , 1 ea. ....	.40
Gate valve, 1 ea. ....	2.75
<hr/>	
Total amount .....	\$ 58.49
Less: Discounts .....	5.84
<hr/>	
Balance of amount .....	\$ 52.65

## Schedule "C"

Pipe straps, 100 ea. ....	\$ 10.00
Reducer, $\frac{3}{4}$ " to $\frac{1}{2}$ " , 9 ea. ....	3.15
Locknuts, $\frac{3}{4}$ " , 9 ea. ....	.36
Cond. pipe, $\frac{1}{2}$ " , 30 ea. ....	12.00
12-3 Romex wire, 1 roll .....	55.00
Bushing, $\frac{1}{2}$ " , 10 ea. ....	.60
Locknut, $\frac{1}{2}$ " , 30 ea. ....	.90
Pipe straps, $\frac{1}{2}$ " , 20 ea. ....	2.00
200 amps. fuse, 6 ea. ....	28.80
803 Romex wire, 25 ft. ....	14.00
Pressure connectors, 3 ea. ....	.45
Slimline, 1 ea. ....	39.50
Light, #410, 1 ea. ....	6.50
<hr/>	
Total amount .....	\$ 173.26
Less: Discounts .....	45.57
<hr/>	
Balance of amount .....	\$ 127.69

## Schedule "D"

Crush corals, 1 load .....	\$ 9.00
Crush corals, 2 loads .....	18.00
<hr/>	
Total amount .....	\$ 27.00

[Endorsed]: Filed November 4, 1954.

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND  
MOTION TO DISMISS

The defendant, American Pacific Dairy Products, Inc., specially appears and severing itself from the defendant, Joseph Siciliano, pursuant to Rule 8 (a), 9 (a) and 12 (b) of the Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the complaint in the above-entitled action because it appears on the face of the complaint that the court lacks jurisdiction and that the requisite jurisdictional averments are not contained within the complaint.

II.

To dismiss the complaint on the ground that defendant is a corporation, is not a citizen or resident of the unincorporated Territory of Guam in which this action is brought and is a citizen and resident of the State of Washington.

III.

To dismiss the complaint herein because the court is without jurisdiction and the defendant in this action is a citizen and resident of the State of Washington, and the provisions of Section 62 of the Code of Civil Procedure of Guam do not confer and cannot confer any jurisdiction on this court.

IV.

To dismiss the complaint because the plaintiff is not entitled to the relief herein prayed for in this

jurisdiction in that the complaint fails to show jurisdiction of this court over this defendant.

## V.

To dismiss the complaint on the ground that the complaint fails to show the capacity of this defendant to be sued.

## VI.

To dismiss the complaint herein filed in that it fails to state a claim upon which relief can be granted.

## VII.

To dismiss the complaint filed herein on the ground that process and service is insufficient as required by the Federal Rules of Civil Procedure, Rule 4.

## VIII.

To dismiss the complaint on the ground that Exhibit "A" attached to the complaint is a statement of account to another corporation and not this defendant.

## IX.

This motion is based upon the pleadings and files in this case and upon the affidavits and exhibits herewith filed.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

[Endorsed]: Filed November 26, 1954.



[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE ON THE  
GROUND OF CONVENIENCE OF PAR-  
TIES AND WITNESSES IN THE INTER-  
EST OF JUSTICE

In the alternative, and only in the event that de-  
fendant's motion to dismiss the complaint is de-  
nied, then the defendant moves the court as follows:

I.

To issue an order transferring the above-entitled  
cause to the United States District Court in and  
for the Northern Division of the Western District  
of the State of Washington at Seattle, Washington,  
on the ground that such transfer is for the conveni-  
ence of the parties and witnesses as more clearly  
appears in the affidavits of Norman Thompson and  
Finton J. Phelan, Jr., hereto annexed as exhibits  
A and B.

Dated this 26th day of November, 1954, at Agana,  
Guam.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

[Title of District Court and Cause.]

EXHIBIT B

Affidavit

Unincorporated Territory of Guam,  
City of Agana—ss.

Norman Thompson, being first duly sworn, on oath, deposes and says:

1. That he is familiar with the defendant herein, American Pacific Dairy Products, Inc., and that of his own knowledge the said defendant corporation maintains its principal offices in the City of Seattle, State of Washington, at 1113 18th Avenue North.

2. That at said main offices all the books of account and corporate records are permanently maintained.

3. That all of the employees and agents of said defendant corporation having access and connection with the books, records and files of the defendant corporation reside in and work in the said City of Seattle, State of Washington. That the officers of the said corporation maintain their place of residence and business in the said City of Seattle, State of Washington.

4. That the directors of the said defendant corporation reside in and at the vicinity of said City of Seattle, State of Washington. That all meetings of the Board of Directors and all records of such meetings are held and maintained in the said principal offices of the said defendant corporation in the City of Seattle, State of Washington.

5. That all books of account and other business records of the said corporation are concentrated and maintained at the principal offices of the said corporation, which corporation operates under a centralized accounting and control system.

6. That of his own personal knowledge the vast majority of the witnesses and the records and other evidence which would be introduced in the defense of this action are situated in the said City of Seattle, State of Washington. That the cost of bringing witnesses to the unincorporated territory of Guam for the defense of this action would entail expenses of many thousands of dollars, would disrupt the operation of the business of the corporation and put a great burden on the corporation and cause heavy financial loss. That bringing the necessary records, files and documents to Guam would be oppressively expensive and cause defendant corporation great financial loss. That many witnesses would have to be brought to the unincorporated territory of Guam in the defense of this action and that adequate quarters and facilities for these witnesses are not available within the unincorporated territory of Guam.

7. That the cost of taking depositions of these numerous witnesses would be burdensome and needlessly expensive, and that to transfer this cause to the United States District Court in and for the Northern Division of the Western District of the City of Seattle, State of Washington, for trial and

disposition is in the interest of justice for the convenience of the parties and witnesses and will expedite the disposition of this matter, and in this connection affiant further says that the within action might have been brought in the latter forum in the first instance for greater convenience of all the parties and witnesses.

Further your deponent sayeth not.

[Seal]     /s/ NORMAN THOMPSON.

Unincorporated Territory of Guam,  
City of Agana—ss.

Norman Thompson, being duly sworn, says that he has read the above and foregoing instrument and the facts stated therein are true, except to those stated on information and belief and that he believes them to be true.

[Seal]     /s/ NORMAN THOMPSON.

Subscribed and sworn to before me this 26th day of November, 1954.

[Seal]     /s/ SYLVIA O. SHEPHERD,  
Notary Public in and for the Unincorporated Territory of Guam.

My Commission expires November 6, 1955.

[Title of District Court and Cause.]

EXHIBIT A

Affidavit

Unincorporated Territory of Guam,  
City of Agana—ss.

Finton J. Phelan, Jr., being first duly sworn, on oath, deposes and says:

1. Affiant is the attorney within the unincorporated territory of Guam for the defendant corporation in the above-entitled action.

2. That he has been informed by officers of the defendant and their counsel that the main office of the defendant is situated within the City of Seattle, State of Washington, at 1113 18th Avenue North.

3. That at said principal office of the defendant corporation all of their corporate records, papers and files are maintained and that likewise all the records and files of the Board of Directors of said corporation are maintained at the principal offices.

4. That the defendant corporation maintains a centralized system of control and all of its business records and management files are maintained at the principal offices of the defendant corporation in the City of Seattle, State of Washington.

5. That all of the principal officers, directors and executive employees of the defendant corporation reside in and around the City of Seattle, State of Washington.

6. That the officers, directors and executive employees of said defendant corporation are and will be necessary and important witnesses in the defense of this action.

7. That the defendant corporation will suffer great damage if put to the expense of transporting the officers, directors and other key employees of said corporation to Guam for the trial and defense of this action and that the corporation will be greatly and needlessly injured by the necessary and forced absence of its key officers at such a great distance from the principal office in the City of Seattle, State of Washington.

8. That within the unincorporated territory of Guam are not adequate facilities for the temporary housing of these officers and other witnesses.

9. That the defendant corporation will be heavily damaged and put to great expense by having large amounts of its corporate and business records absent from its principal offices and that this absence will cause great loss in the operation of the business of the defendant corporation.

10. That due to the large number of depositions of officers, directors, employees and accountants which would have to be taken, defendant corporation would be put to great and needless expense, inconvenience and will be hampered in the operation of its business.

11. That the forum of the Northern Division of the Western District at the City of Seattle, State

of Washington, is the most convenient one for the necessary and proper witnesses to attend and that a trial at that forum would incur the least cost and great saving of time for all concerned, and that for the convenience of the parties and witnesses and in the interest of justice to so transfer the case to the United States District Court in and for the Northern Division of the Western District at the City of Seattle, State of Washington, for trial and disposition in which district the within action might have been brought in the first instance is to the convenience of the parties and witnesses and is in the interest of justice in this cause.

Further your deponent sayeth not.

[Seal]     /s/ FINTON J. PHELAN, JR.,  
  Attorney for Defendant Cor-  
  poration.

Unincorporated Territory of Guam,  
City of Agana—ss.

Finton J. Phelan, Jr., being duly sworn, says that he has read the above and foregoing instrument and the facts stated therein are true, except to those stated on information and belief and that he believes them to be true.

[Seal]     /s/ FINTON J. PHELAN, JR.,  
  Affiant.

Subscribed and sworn to before me this 26th day of November, 1954.

[Seal]      /s/ SYLVIA O. SHEPHERD,  
Notary Public in and for the Unincorporated Territory of Guam.

My Commission expires November 6, 1955.

[Endorsed]: Filed November 26, 1954.

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[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT  
AND MOTION TO STRIKE

Motion for More Definite Statement

In the alternative, and only in the event that defendant American Pacific Dairy Products, Inc.'s motion to dismiss the complaint is denied and the motion for change of venue should thereafter be denied, defendant, American Pacific Dairy Products, Inc., moves the court as follows:

I.

That the complaint is so vague and ambiguous that defendant should not reasonably be required to prepare a responsive pleading and defendant American Pacific Dairy Products, Inc., therefore moves that plaintiff be ordered to furnish a more definite statement of the nature of his claim, as set forth, in the following respects:



1. In paragraph III of the complaint, plaintiff should be required to indicate when and where the parties hereto became indebted to the plaintiff.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.,

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

### Motion to Strike

In the alternative, and only in the event that defendant's motion to dismiss the complaint is denied, and thereafter the motion for change of venue and motion for more definite statement be denied, then defendant American Pacific Dairy Products, Inc., moves the court to strike paragraph III of the complaint on the ground that it is a conclusion of law and is contrary to Exhibit "A" thereto annexed.

To strike Exhibit "A" of the complaint on the ground that it is a statement of account to a corporation not a party to this action and on its face shows clearly that it is not a statement of account to the defendant or to the alleged partnership or partners.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

[Endorsed]: Filed November 26, 1954.

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[Title of District Court and Cause.]

### ANSWER AND CROSS-COMPLAINT

The defendant, American Pacific Dairy Products, Inc., for answer to the Complaint herein, admits, denies and alleges as follows:

#### I.

The defendant is without information or knowledge sufficient to form a belief as to the allegations in paragraph I of plaintiff's complaint and, therefore, denies the same.

#### II.

The defendant denies the allegations contained in paragraph II of plaintiff's complaint.

#### III.

The defendant denies that it, or any purported partnership, doing business under the firm name and style of Dairy Queen of Guam owes the plaintiff the sum of (\$13,870.48) Thirteen Thousand Eight Hundred Seventy and 48/100 Dollars, or any other sum.

Wherefore, having fully answered, the defendant prays that plaintiff's complaint be dismissed with prejudice and with costs taxed in favor of this defendant and against the plaintiff.

#### First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

#### Second Defense

The court in this action lacks jurisdiction of the subject matter.

#### Third Defense

The venue of this action is improper.

#### Fourth Defense

That the amounts claimed by the plaintiff for subsistence, housing and transportation, for the Filipino contract laborers, if any were used, as set forth in Exhibit "A," would be illegal by virtue of the immigration laws of the United States as set forth in sections 1101 and 1184 of Title 8, U.S.C.A., and the Regulations of the Attorney General of the United States and Commissioner of Immigration of the United States implementing those sections, and defendant was relying on Joseph Siciliano to lawfully obtain labor for its operations.

#### Counterclaim

The defendant, American Pacific Dairy Products, Inc., for counterclaim against the plaintiff alleges as follows:

## I.

That the plaintiff removed from the property of the Dairy Queen of Guam certain motors, condensers and equipment used in air conditioning said premises and the defendant hereby claims the sum of Four Hundred Fifty Dollars (\$450.00) as damages resulting from the removal of said equipment and substitution of inferior equipment.

## II.

That frozen strawberries and other supplies, including vanilla, were purchased in the name of this defendant and were diverted to the use of the plaintiff, all to the damage of the defendant in the sum of One Thousand Eighty Dollars (\$1,080.00.)

## III.

That certain materials and supplies were left from the construction of the building for the Dairy Queen of Guam and the plaintiff diverted these supplies to its own use and this defendant was damaged in the sum of Three Hundred Thirty-three and 99/100 Dollars (\$333.99).

Wherefore, this defendant requests judgment against the plaintiff in the sum of One Thousand Eight Hundred Sixty-three and 99/100 Dollars (\$1,863.99).

Cross-Complaint Against Joseph Siciliano

## I.

That defendant, Joseph Siciliano, is the majority stockholder of the plaintiff, Pacific Enterprises,

Inc., is an officer and director thereof, and controls its actions.

## II.

That defendant Joseph Siciliano conspired with the plaintiff Pacific Enterprises, Inc., to wrongfully and erroneously increase and expand the charges of Pacific Enterprises, Inc., to the purported partnership existing between the defendant Joseph Siciliano and the defendant American Pacific Dairy Products, Inc.

## III.

That defendant Joseph Siciliano was in a position to injure the defendant American Pacific Dairy Products, Inc., in that the defendant Joseph Siciliano was supposedly acting as managing partner of the business on Guam under a de facto partnership agreement during the period in which his corporation, Pacific Enterprises, Inc., claims to have been furnishing the services and supplies set forth in Exhibit A attached to the complaint.

## IV.

That in addition to erroneously increasing the amount due Pacific Enterprises, Inc., the defendant Joseph Siciliano diverted supplies paid for by the Dairy Queen of Guam to Pacific Enterprises and other enterprises owned or operated by the defendant Joseph Siciliano.

## V.

That the defendant Joseph Siciliano maintained a grossly inadequate system of records for the Dairy Queen of Guam and did not report the expenditures

made by said Dairy Queen of Guam and thus is responsible for the lack of information and records in the hands of the defendant American Pacific Dairy Products regarding the debts owed by said Dairy Queen of Guam.

## VI.

That as part of the scheme to mulct the defendant American Pacific Dairy Products, Inc., and for the purpose of concealing from said American Pacific Dairy Products, Inc., the diversion of funds, materials, supplies and overcharges to and by the plaintiff Pacific Enterprises, Inc., and other businesses of defendant Joseph Siciliano, the said defendant Joseph Siciliano caused to be installed and used a skimpy and inadequate system of bookkeeping at the Dairy Queen of Guam and caused to be misplaced, concealed and destroyed many of the supporting documents and basic records of the business. That without such records and documents the true liabilities and assets of the business were and are concealed.

## VII.

That in keeping the books of the Dairy Queen of Guam the defendant Joseph Siciliano wrongfully and illegally utilized the services of one Diza, an employee of the plaintiff, Pacific Enterprises, and upon information and belief an officer of plaintiff, Pacific Enterprises, Inc., and a director of the same. Defendant Joseph Siciliano also used in the operating of the business of the Dairy Queen of Guam other employees of the plaintiff Pacific Enterprises, Inc., contrary to the provisions of Title 8 U.S.C.A.

Wherefore, defendant prays for judgment against Joseph Siciliano as follows:

1. That the defendant Joseph Siciliano account for all moneys received during the de facto partnership in the operation of Dairy Queen of Guam.

2. That the defendant Joseph Siciliano be required to pay to the plaintiff the sum of One Thousand Eight Hundred Sixty-three and 99/100 Dollars (\$1,863.99) for damages caused by defendant Joseph Siciliano's inadequate management and conspiring to divert supplies and equipment from the Dairy Queen of Guam while under his management and control.

3. That the defendant Joseph Siciliano be required to account for the diversion of the air-conditioning equipment from the Dairy Queen of Guam.

4. That the court grant such other and further relief as the court may deem proper and lawful.

/s/ FINTON J. PHELAN, JR.,

Attorney for Defendant, American Pacific Dairy  
Products, Inc.

Duly verified.

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

### REPLY TO THE COUNTERCLAIM

Comes now the plaintiff, Pacific Enterprises, Inc., a corporation, in the above-entitled action and replying to defendants' counterclaim, admits, denies and alleges as follows, to wit:

#### Reply to Counterclaim

##### I.

Replying to paragraphs I, II, and III contained in defendants' counterclaim, plaintiff denies each and every, all and singular the allegations contained in said paragraphs.

Wherefore, plaintiff prays that the defendants take nothing by virtue of said counterclaim and that judgment be rendered as prayed for in the complaint on file herein.

/s/ JOHN A. BOHN,

/s/ ROBERT E. DUFFY,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 19, 1955.

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[Title of District Court and Cause.]

### ANSWER TO CROSS-CLAIM

Comes now Joseph Siciliano, an individual, and answering the cross-claim labelled, Counterclaim,



referred to as Cross-Complaint, of American Pacific Dairy Products, Inc., co-defendants in an action brought by Pacific Enterprises, Inc., a corporation, admits, denies and alleges as follows:

I.

Answering paragraph I of said cross-claim, admits that he is the majority stockholder and is an officer and director of Pacific Enterprises, Inc., and denies each and every, all and singular the other allegations contained in said paragraph I.

II.

Answering paragraphs II, III, IV, V, VI, and VII in said cross-claim contained, denies each and every, all and singular the allegations therein contained.

Wherefore, said Joseph Siciliano as an individual prays that the cross-claimants take nothing by said cross-claim, and that the cross-claim against him be dismissed with his costs of suit herein, and that he have such other and further relief as to the Court shall seem meet and proper.

/s/ JOHN A. BOHN,

/s/ ROBERT E. DUFFY,

Attorneys for Cross-Defendant Joseph Siciliano.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

### PRETRIAL ORDER

JOHN A. BOHN, and  
ROBERT E. DUFFY,  
Attorneys for the Plaintiff.

FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

January 26, 1955, at 9:30 A.M.

#### I. Pleadings:

The plaintiff filed this action against the defendants for the amount of \$13,870.48, alleged to represent services and supplies by the plaintiff to the defendants in connection with the business and litigation in Civil Case No. 59-54, Joseph Siciliano vs. American Pacific Dairy Products, Inc.

The defendant, American Pacific Dairy Products, Inc., has filed an answer and cross-complaint which is in effect a denial of the principal amount claimed by the plaintiff and an allegation that the plaintiff owes the defendant \$1,863.99.

#### II. Conference:

At the pretrial conference it developed that neither of the parties was sufficiently familiar with the circumstances surrounding the above claim to enable the court to prepare an intelligent pretrial order.

It was therefore agreed that the case should be set for trial and consolidated with Civil 59-54 in order to avoid duplication of testimony.

III. Order: It is herewith ordered:

1. The above-entitled action is set for trial February 14, A.D. 1955, at 9:30 a.m.
2. The action is consolidated for purposes of trial with Civil 59-54, Siciliano vs. American Pacific Dairy Products, Inc.
3. Any evidence produced in 59-54 which is material to the issue shall be considered as having been introduced in 68-54, the present action.

Dated and entered this 26th day of January, A.D. 1955.

/s/ PAUL D. SHRIVER,  
Judge.

Approved:

/s/ JOHN A. BOHN,  
Attorney for Plaintiff.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendants.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

### REQUEST FOR ADMISSION OF FACTS

To: John Bohm and Robert Duffy, Esquires, Attorneys for Plaintiff, Agana, Guam.

Please take notice that the defendant, American Pacific Dairy Products, Inc., hereby requests the plaintiff, Pacific Enterprises, Inc., pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit, within ten (10) days after service of this request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That no contract was ever executed by the Dairy Queen of Guam or on its behalf with Pacific Enterprises, Inc.
2. That Pacific Enterprises, Inc., was never authorized by the United States Immigration and Naturalization Service to contract out their alien contract employees to the Dairy Queen of Guam or to any other business.
3. That Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc.
4. That Henry Diza is not an officer of Pacific Enterprises, Inc.
5. That Henry Diza never was an officer of Pacific Enterprises, Inc.
6. That Henry Diza is an alien contract employee of Pacific Enterprises, Inc.

7. That except for qualifying shares of stock all stock in Pacific Enterprises, Inc., is held in the name of and for the benefit of Joseph A. Siciliano.

8. That employees of Pacific Enterprises, Inc., removed from the Dairy Queen of Guam 2500 pounds of frozen strawberries, 50 gallons of vanilla extract, sheets of plywood and other building materials, certain motors and condensers and other equipment from the air conditioning plant of the Dairy Queen of Guam.

9. That no merchandise of the Dairy Queen of Guam was segregated in the warehouse of Pacific Enterprises, Inc.

10. That Pacific Enterprises, Inc., never submitted a statement of account to the Dairy Queen of Guam until the year 1954.

11. That Pacific Enterprises, Inc., does not maintain separate books of account separate and distinct from the personal books of Joseph A. Siciliano.

12. That Pacific Enterprises, Inc., has in its possession certain books of account and supporting vouchers of the Dairy Queen of Guam for the period July, 1952, to April, 1953.

13. That Pacific Enterprises, Inc., did through its employees and alien contract employees operate the business of the Dairy Queen of Guam from the period July, 1952, until May, 1953.

14. That American Pacific Dairy Products, Inc.,

was not advised of such operation by Pacific Enterprises, Inc.

15. That during the period of operation by Pacific Enterprises, Inc., the funds of the Dairy Queen of Guam were commingled with funds of Pacific Enterprises, Inc.

16. That during the period June, 1952, to April, 1953, the agents and servants of Pacific Enterprises, Inc., working at Dairy Queen of Guam:

a. did not maintain daily, weekly or monthly inventories.

b. did not preserve the daily tapes from the cash register.

c. did not daily or weekly deposit funds of the Dairy Queen of Guam in the bank account.

d. frequently and as a regular course of business paid all bills of the Dairy Queen of Guam by cash payment.

Dated at Agana, Guam, this 2nd day of February, 1955.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 2, 1955.

In the District Court of Guam,  
Territory of Guam  
Civil Action No. 59-54

JOSEPH A. SICILIANO,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC., a Corporation,

Defendant.

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC., and JOSEPH SICILIANO, Co-Part-  
ners, Doing Business Under the Firm Name  
and Style of DAIRY QUEEN OF GUAM,

Defendants.

#### DEMAND FOR JURY TRIAL

The defendant, American Pacific Dairy Products, Inc., requests the Court to direct a jury trial of the issues raised by the complaint and the answer filed by this defendant and the issues raised by the counter-claim filed by this defendant, and a jury trial upon the issues raised by the cross-complaint against the co-defendant, Joseph Siciliano, filed by this defendant.

/s/ FINTON J. PHELAN, JR.,

Attorney for Defendant, American Pacific Dairy  
Products, Inc.,

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,

Attorney for Defendant, American Pacific Dairy  
Products, Inc.

[Endorsed]: Filed February 9, 1955.

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[Title of District Court and Causes.]

Nos. 59-54 and 68-54

### MOTION FOR SEVERANCE

The defendant, American Pacific Dairy Products, Inc., moves the Court as follows:

#### I.

That severance be ordered and separate trials be directed on the issues framed by the complaint and answer of this defendant and that the trial of the issues between the co-defendant, Joseph Siciliano, and the plaintiff be tried separately, and that the cross-complaint of this defendant against Joseph Siciliano be likewise separately tried, on the following grounds:

1. That the plaintiff in this action, Pacific Enterprises, Inc., Civil No. 68-54, is the alter ego of co-defendant, Joseph Siciliano, and is in fact indistinguishable from Joseph Siciliano.

2. That the attorneys representing plaintiff in this action, John Bohn and Robert E. Duffy, are



also the attorneys representing Joseph Siciliano, who is plaintiff in Civil No. 59-54, wherein this defendant is also a defendant, and that when this defendant filed a cross-complaint against Joseph Siciliano in this action wherein Joseph Siciliano, who is in fact also the plaintiff, was named as a co-defendant with this defendant, the said attorneys for the plaintiff, Pacific Enterprises, Inc., appeared for defendant and cross-defendant Joseph Siciliano, and filed his answer.

3. That the issues as drawn in the pleadings are such when considered with the fact that the attorneys for plaintiff, Pacific Enterprises, Inc., are also defending the co-defendant, Joseph A. Siciliano, and in effect Joseph Siciliano is both plaintiff and defendant, a fair trial of the issues in this action cannot be had.

This motion is based upon the pleadings and files in Civil No. 59-54 and Civil No. 68-54, and upon the affidavits this day filed.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

OBJECTIONS AND ANSWERS TO  
REQUESTS FOR ADMISSIONS

Plaintiff herewith presents proposed answers to some of defendant's requests for admissions and his objections to the remainder of said requests as follows, to wit:

I.

That all of defendant's requests for admissions are wholly improper and not timely in that on the 20th day of January, 1955, a pre-trial hearing was had on this case pursuant to an order of the District Court of Guam and that at that time the defendant was given an opportunity to request admissions of facts and of documents, but did fail absolutely and entirely to do so; that the scope of the issues in the case were set in the aforementioned pre-trial hearing, and to permit the requests of defendant for admissions at this time would serve to expand the pre-trial order, result in unnecessary delay, and violate the reasons and purposes for a pre-trial hearing.

II.

That the defendant has had ample opportunity to avail itself of the procedures provided for in Rule 36 of the Federal Rules of Civil Procedure pertaining to requests for admission, and has earlier neglected and refused to do so; that at this time, subsequent to the pre-trial hearing and pre-trial order of the District Court, shortly before the time

set for the trial of the action upon its merits the request of the defendant for admissions places an onerous and unfair burden upon the plaintiff.

### III.

That all of the facts for which admissions are requested are controversial facts disputed by the plaintiff, and that the proper procedure to elicit such information is through discovery methods set forth in the Federal Rules of Civil Procedure and not by requests for admissions.

### IV.

Plaintiff herein for further objection to the requests for admissions served by defendant, states that he is unable and unwilling to admit the truth of certain requested facts and for the reasons set forth below cited to each fact requested, objects as follows:

(1) That question No. 1 is uncertain and ambiguous in that it cannot be ascertained from the question whether or not defendant refers to a written, oral, express or implied contract.

(2) That question No. 2 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and serv-

ices and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(3) In answer to question No. 3, plaintiff denies that Joseph A. Siciliano is the sole owner of Pacific Enterprises, Inc., but states that as of the dates material to this action he did own all of the shares of the corporation except a few qualifying shares, and further admits that for the purposes of this case only that he owned, controlled, dominated and was the alter ego of the corporation named in said question.

(4) That question No. 4 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore same ought to be paid? That said request for admission is not pertinent to these issues.

(5) That Question No. 5 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore

same ought to be paid? That said request for admission is not pertinent to these issues.

(6) That Question No. 6 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore same ought to be paid? That said request for admission is not pertinent to these issues.

(7) Plaintiff admits that as of the dates material to this action, that except for a few qualifying shares of stock, all stock in Pacific Enterprises, Inc., was held in the name and for the benefit of the plaintiff.

(8) Plaintiff objects to Question No. 8 on the grounds that it is uncertain, ambiguous, misleading and does not subject itself to admission or denial; that the fact requested is a controversial fact disputed by the plaintiff and that the proper procedure to elicit such information is through discovery methods set forth in the Federal Rules of Civil Procedure and not by requests for admissions.

(9) That Question No. 9 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and

performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(10) Plaintiff denies the question asked in Question No. 10.

(11) That Question No. 11 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(12) That Question No. 12 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(13) That Question No. 13 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(14) That Question No. 14 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(15) That Question No. 15 is irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their

value, wherefore the same ought to be paid? That said request for admission is not pertinent to these issues.

(16) That Questions Nos. 16 a, 16 b, 16 c, and 16 d, are irrelevant, immaterial and outside of the issues of the case; that the issues as set forth in the pre-trial order of the Court are simple, and substantially as follows: (a) Whether or not plaintiff has delivered goods and performed services for defendant on an open account? (b) Whether defendant has accepted the goods and services and does refuse to pay their value, wherefore the same ought to be paid? That said requests for admission are not pertinent to these issues, and that questions Nos. 16 a, 16 b, 16 c, 16 d, are further improper in that they are ambiguous and misleading and are among the controversial facts in issue at the trial.

/s/ JOSEPH SICILIANO.

Subscribed and Sworn to before me this 9th day of February, 1955.

[Seal] /s/ E. L. CORFELL,

Notary Public in and for the  
Territory of Guam.

My commission expires July 27, 1955.

[Endorsed]: Filed February 10, 1955.



In the District Court of Guam  
In and for the Territory of Guam

Civil Action No. 68-54

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC., and JOSEPH SICILIANO, Co-Part-  
ners Doing Business Under the Firm Name and  
Style of DAIRY QUEEN OF GUAM,

Defendants.

### JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 18th day of February, 1955, Messrs. John A. Bohn and Robert E. Duffy appeared as attorneys for the Plaintiff, and Finton J. Phelan, Jr., Esq., appeared as attorney for the Defendant, American Pacific Dairy Products, Inc., and the Court having heard the testimony and examined the proofs offered by the respective parties, and being fully advised in the premises,

Now, therefore, by reason of the law and the facts aforesaid, it is

Ordered, Adjudged and Decreed:

1. That judgment be entered for the plaintiff and against the defendants in the amount of Six

Thousand Five Hundred Thirty-Four Dollars and Fifty-five Cents (\$6,534.55).

2. That execution on the judgment be stayed for thirty (30) days from the 18th day of February, 1955.

Done in Open Court this 18th day of February, 1955, and presented for signature the 28th day of February, 1955.

/s/ PAUL D. SHRIVER,  
Judge of the District Court.

May 6, 1955. Costs taxed in the sum of forty-six dollars (\$46.00).

/s/ ROLAND A. GILLETTE,  
Clerk.

[Endorsed]: Filed February 28, 1955.

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[Title of District Court and Cause.]

Civil No. 68-54

### NOTICE OF APPEAL

Notice is hereby given that American Pacific Dairy Products, Inc., a defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered on the 28th day of February, 1955.

Dated at Agana, Guam, this 17th day of March, 1955.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant, American Pacific Dairy  
Products, Inc.

[Endorsed]: Filed March 19, 1955.

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[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the plaintiff, the sum of two hundred fifty dollars (\$250.00).

The condition of this bond is that, whereas the defendant, American Pacific Dairy Products, Inc., has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed March 17, 1955, from the judgment of this court entered February 28, 1955, if the defendant shall pay all costs adjudged against him if the appeal is dismissed or if the judgment is modified, then this bond is to be void, but if the defendant fails to perform this con-

dition, payment of the amount of this bond shall be due forthwith.

/s/ HELENA F. PHELAN,  
Oka, Guam;

/s/ EDWARD THOMPSON,  
Anigua, Guam.

Signed and acknowledged before me this 19th day of March, 1955.

[Seal] /s/ [Indistinguishable],  
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires December 13, 1956.

[Endorsed]: Filed March 19, 1955.

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[Title of District Court and Cause.]

### MOTION

The defendant, American Pacific Dairy Products, Inc., a corporation, moves the court to stay the enforcement in the judgment in this action pending the disposition of the defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by the defendant.

Dated at the City of Agana, unincorporated Territory of Guam, this 16th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,  
Attorney for Defendant,

By /s/ FINTON J. PHELAN, JR.,  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Defendant.

Approved: Judge of the District Court of Guam.  
\$7000.00.

See Supersedeas Bond for Approval.

/s/ R. A. G.

[Endorsed]: Filed April 16, 1955.

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[Title of District Court and Cause.]

### SUPERSEDEAS BOND

P. G. Bond No. 698

Know All Men by These Presents: That we, American Pacific Dairy Products, Inc., a Washington corporation, as principal, and Philippine Guaranty Co., Inc., Manila, Republic of the Philippines, by Pacific Insurance Associates, Ltd., General Agent for Guam, as surety, are held and firmly bound unto Pacific Enterprises, Inc., in the sum of \$7000.00, to be paid to the said Pacific Enterprises, Inc., its attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of April, 1955.

Whereas, lately in a suit pending in the District Court of Guam in and for the unincorporated territory of Guam, between Pacific Enterprises, Inc., and American Pacific Dairy Products, Inc., a judgment was rendered against the defendant, American Pacific Dairy Products, Inc., and defendant Joseph Siciliano, and said American Pacific Dairy Products, Inc., having filed a notice of appeal dated the 19th day of March, 1955, to reverse the judgment, on appeal to the United States Court of Appeals for the Ninth Circuit.

Now the condition of this obligation is such, that if American Pacific Dairy Products, Inc., shall prosecute this appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and satisfy any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation to be void; else to remain in full force and effect.

/s/ EDWARD THOMPSON.

[Seal]

AMERICAN PACIFIC DAIRY  
PRODUCTS, INC.,  
Principal.

By /s/ EDWARD THOMPSON,  
President.

Subscribed and sworn to before me this 18th day of April, 1955.

[Seal] /s/ [Indistinguishable],  
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires December 13, 1956.

[Seal] PHILIPPINE GUARANTY  
CO., INC.,

By /s/ W. E. FRITSCHÉ,

PACIFIC INSURANCE  
ASSOCIATES, LTD.,  
Surety.

Unincorporated Territory of Guam,  
City of Agana—ss.

On this 18th day of April, 1955, before me, the undersigned, a notary public in and for the unincorporated territory of Guam, personally appeared Philippine Guaranty Co., Inc., Manila, Republic of the Philippines, by W. E. Fritsche, General Manager, of Pacific Insurance Associates, General Agent for Guam, and duly acknowledged to me that as such General Manager, he executed the foregoing instrument as the free act and deed of the said Philippine Guaranty Co., Inc., for the consideration and purposes therein mentioned.

Witness my hand and notarial seal at Agana, unincorporated territory of Guam, the day and year in this certificate first above written.

[Seal] /s/ [Indistinguishable],  
Notary Public in and for the Unincorporated Territory of Guam.

My commission expires December 13, 1956.

Form of bond and sufficiency of surety approved.

/s/ PAUL D. SHRIVER,  
Judge of the District Court of  
Guam.

[Endorsed]: Filed April 19, 1955.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Defendant-Appellant herewith presents the statement of points upon which appellant intends to rely on appeal:

1. The court erred in entering judgment for the plaintiff against the defendant in that said judgment is contrary to the law, contrary to the evidence, and is not supported by the weight of competent evidence.

2. The court erred in permitting the attorneys for the plaintiff to represent the co-defendant, Joseph Siciliano.



3. The plaintiff lacked the capacity to maintain this action.

4. The court erred in not dismissing plaintiff's action in view of co-defendant Siciliano's admission that the plaintiff corporation was his alter ego and was owned and controlled by him.

5. The court erred in not dismissing the plaintiff's claim against the defendant in that it failed to state a claim upon which relief could be granted.

6. The court erred in denying defendant's motions for change of venue and to dismiss for lack of jurisdiction, and in denying defendant's demand for a jury trial.

7. The court erred in failing to file findings of fact and conclusions of law in this action.

/s/ FINTON J. PHELAN, JR.,

Attorney for Defendant, American Pacific Dairy  
Products, Inc.

/s/ FINTON J. PHELAN, JR., for  
LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,

Attorneys for Defendant, American Pacific Dairy  
Products, Inc., Seattle, Washington.

[Endorsed]: Filed June 20, 1955.

District Court of Guam,  
Territory of Guam  
Civil Case No. 68-54

Before: The Honorable Paul D. Shriver, Judge.

PACIFIC ENTERPRISES, INC.,

Plaintiff,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC., and JOSEPH SICILIANO, Co-Partners  
Doing Business Under the Firm Name and  
Style of DAIRY QUEEN OF GUAM,

Defendants.

### TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

JOHN A. BOHN.

For the Defendant, American Pacific Dairy  
Products, Inc.:

FINTON J. PHELAN, JR.

February 17, 1955, 10:35 A.M.

The Court: The court will now take up Joseph A. Siciliano for Pacific Enterprises, Inc., plaintiff, vs. American Pacific Dairy Products, Inc., a corporation, No. 68-54, it being understood that neither party need repeat any evidence which was pre-

sented in Civil No. 59-54, in accordance with the pretrial order heretofore entered.

Mr. Bohn: May I proceed at this time, your Honor?

The Court: Yes.

Mr. Bohn: I ask permission to call Mr. Thompson as an adverse witness, if your Honor please, in this case. If the Court please, with the Court's permission, in the interest of saving time in this case, I would like to rapidly run over these items with Mr. Thompson as a witness to see which items are not in agreement or in substantial disagreement, reserving at this time in evidence those which may turn out not to be in disagreement.

MR. EDWARD THOMPSON

called as an adverse witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. You are the president of American Pacific Dairy Products, is that correct, Mr. Thompson?

A. Yes, sir.

Q. You have previously identified yourself in connection [2\*] with the other case?

A. That is right.

Q. I take it you have in front of you a copy of the statement which was attached to the complaint in the present action?

A. That is right, sir.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Edward Thompson.)

Q. I am going to then go over rapidly with you, first of all, to find out those items that you, in your judgment, admit to be due.

Mr. Phelan: May I ask a question? Are you asking for facts? I would like to know as to whether he is asking Mr. Thompson for his opinion or for facts?

Mr. Bohn: My language was clumsy; I am asking for facts.

The Court: I think it is perfectly clear. He is asking Mr. Thompson, from his knowledge of the business, what amounts claimed by Pacific Enterprises, Inc., are properly chargeable to him.

Mr. Phelan: Well, you see, it is this—he might not know the exact amount.

The Court: Well, go ahead.

Q. (By Mr. Bohn): First of all, turn to page 1, August 1, 1953. You will see an item for subsistence? A. That is right.

Q. Now isn't it a fact that for the period set forth for those items those particular men were furnished subsistence by Pacific Enterprises? [3]

A. That is a fact, sir, and the days shown are correct. May I interrupt on this recap—there is a mistake of \$10. It is carried forward as \$2,031 and it should be \$2,021. You can verify that that is a clerical error, you see. If you will add these on the next page under I, you will find they total \$2,021.30.

Q. I am willing to accept your statement. You have added them and that is the correct total?

(Testimony of Edward Thompson.)

A. On the substatement that is also corrected; I have corrected that.

Q. The times are correct; the people are correct; the amount estimated for subsistence at \$1.45 per man per day?

A. We are satisfied. I thought it reasonable and I thought it was fair, and I remember when I first got the bill I stated so.

Q. Is there any disagreement on housing facilities? A. None on housing facilities.

The Court: Now what items are those?

Mr. Bohn: Those are your subsistence items. I can give the court a total. Perhaps, Mr. Thompson—let's see—we have \$975.85 plus \$2,021.30, is that correct? A. That is right; roughly \$3,000.

Q. I have a total—I haven't checked this schedule 11. Is Schedule 11 a subsistence item?

A. I call those II.

Q. \$67.30—is that subsistence?

A. That is housing. [4]

Q. I see. All right, fine. My total, if your Honor please, to the material just testified is \$2,997.15, is that correct? A. That is correct, yes.

Q. And as to that there is no dispute?

The Court: Now as I understand that takes care of subsistence and the defendant admits that they owe the subsistence?

Mr. Bohn: As to the housing, defendant also raises no objection to that.

Q. (By Mr. Bohn): We have one figure of

(Testimony of Edward Thompson.)

\$398.00 plus \$67.30, is that correct? A. Yes.

Q. Which is admittedly due?

A. Yes, we are not objecting to that.

Q. All right, now then let's turn to the next item—transportation. First of all I have already stated to the Court in informal fashion that I have been informed that that \$600.00 item is erroneous, that you paid some or all of that yourself, is that correct? A. We will accept your statement.

Q. From your figures is anything owed for transportation?

A. No, sir; not a dime. There is no money owed for transportation.

The Court: They admit housing obligations in the amount of \$465.30. That is total housing? [5]

A. That is right, sir.

Mr. Bohn: The total housing figure you just repeated is \$465.30.

The Court: Now as to transportation?

Mr. Bohn: As to transportation we abandoned that request. That is item II or item III.

Q. (By Mr. Bohn): Now the next item, Mr. Thompson, is rent for reefer truck. No. 1, first I will ask you is it a fact that the reefer truck was used during this period?

A. I do not think so; it was not used as a storage for pints and quarts. We didn't need it; we object to that. You want to go into this at this time?

Q. I prefer to come back to it. Now the next item is No. V, for hauling supplies from the Com-

(Testimony of Edward Thompson.)

mercial Dock to the warehouse at \$2.50 a ton. The total is \$146.25.

A. I don't know enough at this time to say.

Q. Is the figure of \$2.50 a ton a reasonable figure for that hauling?

A. I would think it would be, yes.

Q. That is reasonable enough? How about the number of pounds? A. I simply don't know.

Q. If I were to tell you that poundage was arrived at from various shipping documents, would that be satisfactory to you?

A. I think it would. I am not violently opposed to these [6] charges; I just don't know.

Q. Now as to the deliveries of supplies from the warehouse to Dairy Queen?

A. I take the same position.

Q. Now the next item, No. VII, is for storage of supplies. That, as you observe from the item, is computed at a figure of \$35 per month. What is your reaction to that figure?

A. That figure is all right as a monthly rental. There is only one question: Siciliano did not store the supplies from June 22. At that time we had a warehouse free which Getz Brothers was giving us, which was inconvenient so Siciliano's organization moved the stuff down to their own.

Q. What date?

A. We were paying no rental bill so I have no dates to check.

Q. You agree that a rental of \$35 a month is satisfactory but there is a question as to when it

(Testimony of Edward Thompson.)

started, is that right?       A. That is right.

Q. Now the other item of storage—a freezing compartment at \$7.50 a month, totaling \$77.00?

A. That is so close that I wouldn't object to it. The only question there would be the time. I don't think we started on June 22 because we didn't have fresh strawberries then.

Q. You want the starting date?

A. That is all I want. [7]

Q. Would there be a variation of a week or so in the starting date?

A. I don't know when we got the strawberries.

Q. Can we glance now and see? It is a small amount.

A. Yes; if I could see the original journal I might have a pretty fair idea.

Mr. Bohn: May I have the exhibits, Mr. Clerk?

Mr. Phelan: I think it is the top one, Cris. Am I correct?

A. This is the one; I think I can find it. No, we bought some frozen strawberries but it is not carried here. I thought there would be some indication but there isn't.

Q. In the interest of speed would it be satisfactory if we put down July 1 as the beginning date instead of June 22?

A. I don't think it makes much difference.

Q. So it would be \$75.00?

A. I am not trying to chisel on nickels or dimes.

Q. Yes; we are trying to reach substantial agree-



(Testimony of Edward Thompson.)

ment. Now the maintenance figures. You agree there are four of them; one, electrician?

A. I haven't any information at all, and I can't imagine he did put in that much time.

Q. That is a figure you dispute?

A. I dispute that and the reefer mechanic and garbage. I know they didn't haul it every day.

Q. The first three items require testimony and the last [8] item I am willing to reduce that item by one-half. I am informed they did not haul every day. They hauled every other day and a reasonable fee was \$1.00 per hauling enterprise. Is half that figure satisfactory to you?

A. We don't haul that often but we will accept that. We haul about every five days because we have no such thing as garbage. All we have is residue.

Q. So the figure would be \$126.50?

The Court: Whereabouts do you find that?

A. Schedule IX, maintenance.

Mr. Bohn: Item No. 4, Schedule IX.

The Court: What else?

Mr. Bohn: The others are in controversy.

The Court: The others are denied and you admit refuse collection?

Mr. Bohn: At a total amount of \$126.50, to which the plaintiff reduced his demand.

Q. (By Mr. Bohn): Now next is a list of supplies——

A. I can see no need for any plywood, for instance. I don't know what we need with them, and

(Testimony of Edward Thompson.)

200 pounds of granulated sugar—we might have used some to make simple syrup; in fact I am sure we did, but I don't think we used anything like 200 pounds. What is known as imitation vanilla couldn't be used in ice cream.

Q. You question imitation vanilla? Do you question the [9] grounded nuts for \$3.00?

A. No; those could have been.

Q. You question imitation vanilla. How about the mulch paper?

A. I can't imagine what that was used for. Plywood—when I left we had some plywood left over so I can see no need for additional plywood, especially the quarter-inch plywood. That would be for inside trim.

Q. How about the sugar—

A. The sugar is too high; I am sure. Oh, sugar scoops—that is probably all right. We could have used those and DDT and Dutch Cleanser—those are things we use ordinarily and we could have bought them from Pacific Enterprises just as well as J & G or anyone else. Simple syrup is to cut toppings and our toppings were shipped over ready to use and required no cutting.

Mr. Bohn: We will have some testimony as to what it was used for later.

A. Clorox—I will pass that.

Q. (By Mr. Bohn): Lily cups?

A. That is only 200. I am going to pass that although we don't use that size Lily cup.

Q. For your own information I questioned that

(Testimony of Edward Thompson.)

item by a question by counsel in some of the interrogatories. I was informed that there was a time you ran out of a particular cup and this was some kind of emergency situation. [10]

A. Not for \$2.20.

Q. How about the straws?

A. I would like to know about straws. I left 50,000 straws when I left in June. They should have lasted six months.

Q. As to those items the only ones that are admitted are \$3.00, \$3.00, \$1.96, \$3.50, \$11.47, \$2.00 and \$2.23?

A. Yes; I don't know whether they were used or not but I will assume they were.

Q. Now, on the next item, the two loads of crushed coral, lacquer paint and a couple of bulbs?

A. That crushed coral I don't know anything about. We paid Overseas Construction \$1,100 and some odd dollars extra for filling in and leveling the front lot. I can't see why we needed more coral after that was done.

The Court: Where is your item for coral?

A. Item No. XI, your Honor.

The Court: Yes; one item in XI. I first have the paint.

Q. (By Mr. Bohn): Yes; what about the paint?

A. I don't know anything about it. I don't know what it was used for. If I knew what they were used for I could pass upon them.

Q. I was told—it was stated to me that as a result of an inspection there was a request that some

(Testimony of Edward Thompson.)

sections be painted over on the inside and that was what this was used for. However, we can put on testimony. Now on item XII—— [11]

The Court: I am not clear on XI yet.

Mr. Bohn: He requests testimony on all portions of item XI.

The Court: Very well.

Q. (By Mr. Bohn): Now, first of all, I will ask you if you have at the Dairy Queen a  $\frac{3}{4}$  h.p. motor, Westinghouse? A. No, sir; we do not.

Q. It is not there?

A. No, sir; we have looked for that and we have no means of knowing what it was used for, either.

Q. How about the hot fudge heater?

A. I don't know whether it is there. When I opened up here on June 22 I didn't think the people on Guam would want hot fudge sundaes, but Henry sent me an order to ship over some hot fudge. I knew we didn't have a hot fudge heater so I ordered a heater for it also. We paid \$19 for it. We bought the hot fudge heater that is there.

Q. The one you have is the one you bought yourself? A. That is right.

Q. How about these two Universal condensers?

A. And the blower and air cooler evaporator—those three I think we can handle in one thing and the bottom item, too. Before we opened we had the front room, the sales room, air conditioned by a man named Griffith Thomas who is in that business on the island of Guam. I forget what his charge was. It was over [12] \$1,000 and he put all this in. Later

(Testimony of Edward Thompson.)

on I am told that some of Pacific Enterprises men came in and took out some of these units and substituted these two electric fans you see down there. When Norman came over here later on they put back these units for which we were charged. In other words, these units for which we were charged were simply taken out—and for which we paid. When Norman came over here he spent some \$250 or \$300 getting the air conditioning to work, and we still have the fans. They are in the warehouse.

Q. Are you willing to return the fans at this time?

A. Yes; we are willing to return the fans.

Q. Now the rest—it is apparent from your discussion that we require testimony on that. How about the deep freeze?

A. The deep freeze—when I came over, you see, the store had been running for six months when I came over at the end of December, and here is a letter that I have written to Joe Siciliano at Las Vegas. It is dated January 1st. This was a friendly letter to a friend, a business associate.

Q. What is the date of the letter?

A. January 1, 1953. “Joe Meggo and Tony both told me when I saw them last Sunday that we needed two more freezers and another deep freeze for the quarts and pints” and both believed we did. Yet I have never seen that cabinet as much as half full although every night I told Tony to fill the cabinet before he closed for the night. You see, I know quite a bit about this [13] business and out

(Testimony of Edward Thompson.)

of the 2,500 in the United States not more than 25 have more than one cabinet. Later when Norman came over he found this cabinet there. I told him to get rid of it. It was a beat-up cabinet. Joe had it, probably as a hangover from his Harmon Field operation. I told him to get rid of it.

Q. How long ago?

A. When he came in May but that deep freeze was in the place when I came in January or December, 1952. In other words, we operated very successfully with one deep freeze and then it was only half full. That deep freeze will handle more quarts and pints than we sell in a day and in those days we were only handling two flavors.

The Court: What is the date of your letter?

A. January 1, 1953, and it was just a friendly business letter to an associate.

The Court: And so you question all of those items?

A. All of them, yes, sir.

Q. (By Mr. Bohn): The next item on the agenda, item No. XIII. \$90.97 for G. C. Balmonte, I am informed, was relief. Balmonte went down there for a couple of weeks when one of the other men was sick.

A. I believe it.

Q. I think we even have the name of the man who was ill.

A. Yes.

Q. A man could be sick. Now there is the item for [14] bookkeeping from 22 June to March, '53?

A. We wouldn't concede that.

Q. You will not?

A. No, sir.

(Testimony of Edward Thompson.)

Q. You will concede that he kept the books? You don't concede that is a fair amount?

A. He did do some work there, yes.

Q. Are you willing to concede his services worth anything for which you are willing to pay?

A. I will pass that for the moment. The same goes for Viet and Meggo. I want to pass those.

Q. And the next item is the item on the construction of the building. As I understand you have an item showing the total amount demanded?

A. Yes. The total amount?

Q. Yes. A. The suit is for \$13,870.

Q. I mean the total amount for building. You and I have been talking in previous questions about \$4,000. My figures which I quickly totaled yesterday show that we are demanding \$3,000.

A. Yes; when you said \$4,000, it sounded high.

Q. It is \$3,619.96? A. Yes, sir.

Q. No. 1, you concede that the structure was [15] built? A. I found out that it was, yes.

Q. It is being used at the present time by your son as both an office and living quarters?

A. Yes, but we don't need it for that. It was an eyesore for many months and finally he asked if he could close it in in front, put plywood and paint it and make it match the rest of the store if we could use it, and I said, "If you want to take the same chance that Mr. Siciliano did, go ahead but we don't owe a dime on that."

Q. You claim it was unreasonable and undesirable and therefore you don't owe anything? Are the

(Testimony of Edward Thompson.)

charges set forth reasonable for a building of that type?      A. No, sir.

Q. Do you question all of them?

A. I can't question all of them. I don't know how many days these men worked. I haven't the slightest idea about that. Here are some items I can question—that quarter-inch plywood, \$6.50 for a sheet, 4 x 8. I was buying plywood for less than \$4.00 in Guam. That would be for marine plywood brand new. This is not water-proofed plywood and it has been used. You can see where the nail holes are. Sometimes around in the corners it is broken a little, but it is perfectly good if you want to put up a building, but I don't believe anyone should pay figures like that for surplus plywood.

Q. What is the square footage of the building? You gave [16] us the dimensions.

A. I would say about 500 square feet.

Q. About 500 square feet?

A. Roughly, yes.

Q. And you question that \$3,300 as a reasonable figure for a building 500 square feet?

A. If I wanted a building of 500 square feet—if I wanted a building I might pay \$3,300 out on bids, but I wouldn't have surplus refrigerator panels used for panelling and I wouldn't pay \$50 apiece for panels. I think the price is around \$10 because George O'Keefe told me Joe Siciliano had a chance——

Q. Well, I don't know whether we should put this in the record.



(Testimony of Edward Thompson.)

A. But we wouldn't have put the panels in.

Q. That is your basic objection?

A. Yes, it is. We didn't order the building. We don't want the building. We didn't know the building was being put in, and I am firmly convinced that the building was constructed to be used as a snack bar for Pacific Enterprises and to be run by Pacific Enterprises.

Q. You believe that?

A. I am reasonably sure, yes.

Q. This figure you are talking about is about \$6.00 per square foot for this building? \$3,300 for 500 square feet?

A. \$7.00 a square foot. [17]

Q. I don't find \$7.00 here.

A. Well, six times five would be 30; it is closer to seven than it is to six.

Q. Actually it is about six and a half?

The Court: \$6.60, I believe.

A. My objection isn't specifically as to the cost but as to the value to us. We didn't want it. We would have been opposed to it.

Q. Now, when were you first advised, Mr. Thompson, that this building was going to be constructed or had been constructed?

A. Well, the first word I got was on August the 1st and I didn't know what that was for. I heard definitely on August 2nd that they had constructed a building.

Q. August 2 of '52?

A. Of '52, yes, and I immediately protested. When I first wrote Joe——

(Testimony of Edward Thompson.)

Q. I would like to know what you said when you found out about it?

A. Here it is. On August 1st—at that time—well, let me read it.

The Court: Is this August, 1952?

A. August 1, '52. It is written to Mr. Joseph Siciliano and at that time I didn't know he hadn't gone back to Guam—"Although I have reason to believe you are still Stateside I have to send this to Guam because I do not know where you can be [18] reached Stateside." This is my opening paragraph. "This morning I received a wire from W. B. Fuller Company asking me to send details about the glass you ordered. I had to write them I had not heard from you. I asked them to hold this up until I could hear from you. Maybe you want to have some glass there in case of accident to the present store. I would like to know something about it. Two days after the store was opened when I left there was a great deal of turmoil"—and then I go into some other things, but that shows——

The Court: Did you ever get a reply to that, Mr. Thompson?

A. No, sir. He called me on August 9 long distance but I think he called me in reference to this second letter that I sent August 2 but continued to address to Post Office Box, Agana. I said, "Bad news travels fast and I heard two things which upset me. No. 1, that I would not recognize the store." That was a bit of sarcasm. "I do not like to get such news second or thirdhand, especially

(Testimony of Edward Thompson.)

this, and for two reasons. The first is you did not mention it to me and I think I should have been consulted. Second, there are between 2,500 or 3,000 Dairy Queen stores in the States and all of them follow the same basic plan of the Thompson's Freeze Company I am interested in in the States and we have 17 of them and we still make no changes and all of them think the stores as built are adequate and since none of you here know how a store should be built, it would have been wiser to make sure you were right," and that is all I said [19] with reference to that, but that is the first time I knew there was an addition.

The Court: That was about August 9?

A. August 2, 1953, and Joe called me up and said——

Mr. Bohn: I shall go on with that.

The Court: Yes.

A. "You seem to be all upset about this thing. You were probably nervous when I talked to you," and he said, "I talked to you about that store," and I denied it and later, on the 11th, I wrote him referring to his phone conversation, "I have been checking over my memorandum and I am sure we did not discuss anything about a snack bar attached to the Dairy Queen store." He told me I was probably nervous and excited and forgot all about it. I told him, "Joe, I am too much of a business man. I do get nervous and I do get excited, but never enough to forget business commitments," and it was discussed but not settled and in this particular

(Testimony of Edward Thompson.)

case there was no reason to get excited or nervous. I was opening the Dairy Queen store and for the past four or five years I know how I think and how I operate. I would have suggested that we at least wait awhile and see what the store would do. I cannot escape the fact that I would not have agreed to change the appearance of the store and any addition is sure to fail to help its appearance. In our phone conversation he said the snack bar was open and operating, so I said, "It is OK." I assumed that the snack bar on the partnership [20] lot belonged to the partnership. In other words, your Honor, I said OK, assuming the thing is open and operating. It is an accomplished fact you just have to take. There is nothing to do about it. That is not an approval of anything.

Q. You testified it wasn't approved later because you didn't approve the glass?

A. Well, that testimony came just this day but Joe's conversation was on August 9, 1952.

Q. Perhaps it is speculative—let me ask you this question: Isn't it a fact that during this period of time Mr. Lyle Turner was acting as Mr. Joseph Siciliano's attorney in fact?

A. I think so. I might have known it at the time but I have forgotten it now.

Q. It is certainly true, is it not, that you and Mr. Turner corresponded frequently in regard to Mr. Turner's activity on behalf of Mr. Siciliano?

A. Frequently is not the term but we did correspond, yes.

(Testimony of Edward Thompson.)

Q. Isn't it true that Mr. Turner wrote to you about October 30, 1952? I will read the language I think he wrote: "I have asked Henry for the figure on the cost of the addition to the Dairy Queen building since he advised me yesterday this has been dispersed from Pacific Enterprises funds. It is my desire to have that disbursement reimbursed at the first opportunity in view of the pending litigation in Guam." Did you [21] ever answer that letter?

A. Yes, sir; I did. His letter of October 30, which I mentioned, was in answer to mine of October 9 in which I mentioned that I discussed certain things with my associates and said none of us were pleased with the addition Joe has built to the store. "With different associates in some instances, I and these associates control some 23 Dairy Queen stores in Washington, 2 in Alaska, and 53 in Pennsylvania. In every instance we insist that only Dairy Queen products be sold on the premises. We do that because we have learned that every Dairy Queen store that tries to serve sandwiches or light lunches winds up broke. However, in this case we did not know how far Joe had gone with the construction of the addition to the store. As much as we dislike it, we dislike even more the idea of making Joe lose the cost of construction if such cost is more than a nominal amount. So, we three decided to let this matter rest until I get back to Guam, when Joe returns, and Joe and I get together and settle this matter." That was my letter of October 9.

Q. Didn't that letter say that even though you

(Testimony of Edward Thompson.)

disliked it, in the interests of harmony you would go on with it?

A. Not as I read this completely.

Q. Isn't it a fact you said to Mr. Turner in substance, "My associates and I don't like it but in the interest of harmony we will make an adjustment on this matter"?

A. No, it wasn't. I said something like that. You see, [22] all this time I was under the impression that the snack bar was open and operating. All I knew was what Joe told me over the phone so on November 1, with reference to a paragraph in a letter—I am referring to Mr. Lyle Turner's—"We all felt that Joe had acted hastily in building a new addition," etc. "It should be decided by both partners. With reference to the addition being built on the present Dairy Queen, we know so little of its purpose, its cost, whether the construction had been completed or in process and so on that we decided that we would let the whole matter ride until Joe and I could get together and look at the matter from all angles, especially if Joe had already spent considerable money on the addition." In other words, we were prepared to swallow our dislike in the interest of harmony. None of this do I construe as being in favor of the store. I am saying I don't want it and we never wanted it. We didn't like it on November 1. I still did not know of its purpose, its cost, whether construction had been completed and so on, but I said, "I am trying to keep the thing going."

(Testimony of Edward Thompson.)

Q. We have your view pretty well before us.

The Court: Did anyone ever write you that Mr. Siciliano, Mr. Turner or anyone else had protested at that time about the store?

A. That has never been done.

The Court: In other words, nobody ever wrote you and questioned the accuracy of the advice you gave Mr. Turner? [23]

A. Nobody ever did and I might add, your Honor, this store was started a very few days after I left Guam in June, 1952.

Q. (By Mr. Bohn): Isn't it a fact that Joe questioned it?

A. I don't think he questioned it. I think he was covering up. He said I was excited and nervous and didn't remember discussing it.

The Court: I want to ask this question: Based upon your experience in the operation of ice cream dispensaries, as a general practice, does not the ice cream dispensary attract a different type of trade from what you would call a snack bar trade?

A. What we call a hamburger business—we think it does.

The Court: Doesn't the ice cream business attract a gentile clientele?

A. We believe so but we may be prejudiced.

The Court: In other words, the drunk doesn't come in?

A. He goes to a beer joint.

The Court: Or for coffee and a hamburger.

Q. (By Mr. Bohn): Now, it is true, is it not,

(Testimony of Edward Thompson.)

that since September or October, 1953, Mr. Norman Thompson has been using this addition as a residence or office?       A. That is correct.

Q. He is using it?

A. Oh, yes; he is using it as of today or American Pacific Dairy Products is using it for [24] Norman.

Q. Are you staying there?

A. I am staying there, too.

Q. So there is value in that building? Isn't it a fact if he wasn't there he would have to live somewhere else?       A. That is up to him.

Q. How about the office?

A. It is no trick at all. He has a typewriter and a desk.

Q. It is a fact, is it not, that whatever office Dairy Queen has on Guam is in that addition?

A. Oh, that is right, yes.

Q. And it is a fact that whatever living quarters you have on Guam for the manager of Dairy Queen are in this addition, is that correct?

A. That is correct, but we don't have to furnish him living quarters, but it is a fact it is being done. He is sleeping there, yes.

Mr. Bohn: I have no other questions.

Mr. Phelan: I have some questions.

#### Cross-Examination

By Mr. Phelan:

Q. First of all, in 1952, who was the attorney for American Pacific Dairy Products?



(Testimony of Edward Thompson.)

Mr. Bohn: I didn't hear that question.

Q. (By Mr. Phelan): I asked who in 1952 was the attorney for American Pacific Dairy [25] Products? A. Lyle Turner.

Q. The answer was Lyle Turner. You did not have any contractual obligations or otherwise to furnish your manager quarters?

A. No, sir; we do not, and before he moved in there he paid his own room rent.

Q. When he fixed that up were any funds of Dairy Queen used to fix that up?

A. No, sir; he bought his own plywood and his own paint, and I think he painted it himself. I don't know.

Q. What value is that to Dairy Queen?

A. The question now, if it has any value, in my opinion, the question is, would we take it at any figure and assume the additional liability. We have to pay Mr. Siciliano quite a bit of money. You might have a pair of shoes and you say, "You have to take them; they are valuable to you," but if I can't afford to buy shoes I don't think I should be forced to buy the shoes. It is as plain to me as that, at least.

Mr. Phelan: I have no further questions.

#### Redirect Examination

By Mr. Bohn:

Q. The same Lyle Turner as I mentioned awhile ago as attorney in fact for Mr. Siciliano was your attorney? A. Yes.

(Testimony of Edward Thompson.)

Q. Did you know also that Mr. Lyle Turner was secretary-treasurer [26] of Pacific Enterprises?

A. I did not know that until he wrote about the laborers and then he signed as secretary-treasurer. Most of his letters were just signed, "Lyle H. Turner."

Mr. Bohn: I have no further questions. Now, if your Honor please, the next witness is the construction foreman on this building and he will—his testimony will simply be that the building was built, that the men were there during the various periods. I don't know how much you want us to go into these details on the matter.

The Court: Well, first, your proof doesn't necessarily have to follow in an exact pattern, but unless you can convince me that the corporation agreed to the construction of this building for the operation of a snack bar, I don't think that this building is a proper charge. The fact that, of necessity, it had to be converted—I think it is worth something and I think you are entitled to some allowance for it but not in terms of total cost. It just absolutely strikes me as being ordinarily beyond imagination that a firm that was attempting to set up an ice cream dispensary here would attempt to operate a snack bar in connection with it because we know Guam and we know that a snack bar does tend to attract the rowdy and dissolute and noisy and obscene, contrary to the normal patronage of an ice cream place, so you have got to show me first before I am interested in your construction cost—you

have got to show me that this [27] corporation ever consented to it.

Mr. Bohn: Well, I will put on Mr. Siciliano and your Honor can judge the testimony for yourself.

The Court: Yes.

MR. JOSEPH A. SICILIANO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Now, Mr. Siciliano, you have been present during some of this testimony so I won't go back over it. The next line of questions is going to be directed toward the building of an addition on the original Dairy Queen store. I will first ask you if you are the one who instructed or directed that that addition be built?           A. I did.

Q. And did you discuss the matter with Mr. Thompson before he left Guam in June of '52?

A. I certainly did.

Q. And what was that discussion?

A. Well, first of all, the location. We talked about it before the Dairy Queen was opened when we were negotiating the partnership. It was in a position that is quite alone and I talked about putting an addition in. It wasn't going to be what you call a snack bar—not a place where you sit down. It [28] was going to be the same idea—windows like the Dairy Queen—and service would be from an open window. All we were going to serve was

(Testimony of Joseph A. Siciliano.)

root beer and hot dogs and so forth in order to keep a crowd in that section, and I discussed it with Mr. Thompson and he said he thought it would be all right. I even asked him where he got the glass for Dairy Queen so I could make it look like the Dairy Queen, as much like it as anything, so the men back home wouldn't feel like we went and done something on the side. This was discussed in a conference when I talked to him before he ever wrote that letter.

Q. Fix the time. It took place about when?

A. I talked to him about July 2. I gave the order and I ordered the glass from the Fuller Company because that was the address he gave me. He gave me the address after I talked to him and I discussed it with him over the phone. I said, "How could you forget? You must have been nervous." I also told him I didn't want to make any difference in the appearance—the edging of the glass should be exactly alike. In fact, we made the front to fit that way. On the phone that day there was a long conversation. He said his board of governors didn't like the idea and that affected his attitude. I could tell. But I said we had already gone ahead and we had a lot of conversation. It was pretty hard to stop but if he wanted to stop I would. I told him he had said, "Go ahead," just before he left because I talked to him just before he left on the plane. I wouldn't go [29] ahead and build a building without letting him know. It doesn't make sense, being

(Testimony of Joseph A. Siciliano.)

a business man. The only one who knew was my foreman because he was in the discussion of how we were going to place the glass. That was before Mr. Thompson left. We even paced it off. We talked about it with the foreman at that time. He is not with me anymore, but he was the one I gave full instructions to, how to conduct this thing while I was gone—to continue this building. He has done all my building before and when I left in this case I knew it would be done right. This was not going to be a place for drunks to come in like the judge said. It was where school boys could come in, buy stuff and put their trash in a trash can and that was the kind of setup. We didn't want to spoil that setup. I realized, as a business man, you didn't want a sit-down place attached to the Dairy Queen. I can show you a brand new popcorn machine and root beer keg that dated back to Harmon Field. That was something I was going to use but it turned out to be a paper operation. This was going to be for sandwiches, root beer, stuff like that, and it was a stand-up deal just like Dairy Queen—no difference—more or less like what they call a milk bar or stand because we discussed that with Mr. Thompson. It was going to be more like a milk bar. That is exactly what we were doing because at that time there was no milk on the island. International Dairy hadn't come in. It was going to be like a milk bar, a dairy bar, that was the idea of the setup because on my own I would never go [30] ahead without letting him know something. That is

(Testimony of Joseph A. Siciliano.)

what I told him over the phone but being as his board of directors didn't like it, he changed his mind. I wouldn't go on without his knowledge. I said, "Because they didn't like it now you are taking a different stand." That was my conversation.

Mr. Bohn: I have no further questions.

### Cross-Examination

By Mr. Phelan:

Q. When was the first time you discussed this addition with Mr. Thompson?

A. Before the store ever opened.

Q. When was that?

A. June 18, June 17, June 19—I don't know exactly.

Q. That was before you entered into this agreement?

A. Yes, sir.

Q. Did you discuss that in the agreement?

A. No; not whatsoever.

Q. All right, how many times did you discuss it with Mr. Thompson?

A. Oh, I have no recollection how many times before but I think right up to the day he left. We talked about it after the agreement was signed.

Q. You think?

A. No, I don't think; I know. Up to the time he took the plane. [31]

Q. Where did you talk about it?

A. In front of the Dairy Queen store, my restaurant, a number of places. I couldn't tell you all

(Testimony of Joseph A. Siciliano.)

the different places—wherever we would be—in the car.

Q. When did you discuss it at your restaurant?

A. Maybe when we had dinner.

Q. When? A. It could have been June 22.

Q. Did you discuss it after that?

A. To the day he took the plane.

Q. How many times did you discuss it in your restaurant?

A. Oh, I'd say I discussed it in front of Madeline one or two times. Madeline was in on almost all of the conversations—Madeline Dorsit—two or three times—whenever he had dinner there—quite frequently.

Q. During the period from 22 June until he left?

A. Well, it might have been before then, too. It was before and after.

Q. But you had a contract with American Pacific Dairy Products from the 23rd of June, didn't you?

A. I don't remember the exact date; I think so.

Q. When did you call him in the States?

A. I think around July 2nd.

Q. Did you tell him about this addition then?

A. Yes. [32]

Q. When was the addition started?

A. It was started about two days before I left or even before. I imagine it started—I had my boys up there right about the time Mr. Thompson left.

Q. Right after Mr. Thompson left?

(Testimony of Joseph A. Siciliano.)

A. It must have been started around that time because I wanted to get into it right away.

Q. Did you ever write him about this in any of your letters?           A. No; I have not.

Q. Did you answer any of his letters about this?

A. No; on answering any letters, the letters were sent to either Mr. Turner or Madeline Dorsit and she answered whatever letters were necessary at the time because, as I told Mr. Thompson at the time, I am a very poor correspondent. I would rather spend \$40 on a phone call than write letters. I have been that way all my life.

Q. Did you order glass?           A. I did.

Q. At this time were you not constructing a new snack bar in Tamuning?

A. No; it was already up.

Q. The present snack bar in Tamuning?

A. It was up and operating.

Q. Didn't you at this time build a new one next to it [33] and move it away?           A. No. Move it?

Q. Yes.           A. I don't follow your question.

Q. You had a snack bar in Tamuning?

A. That is right.

Q. Didn't you rebuild that snack bar and take the original one out?

A. Oh, that was after I left. That was done in '53 some time.

Q. After you left?           A. Sure.

Q. When you ordered this glass from Fuller, how did you direct them to send the statement for the glass?



(Testimony of Joseph A. Siciliano.)

A. Probably to me or Pacific Enterprises; I don't remember.

Q. Why?

A. Because everything we done was through my office because of the freight and the shipment was to come from San Francisco. That is probably why, too.

Q. Why didn't you direct that that statement be sent to Mr. Thompson who was doing all of the Stateside ordering for Dairy Queen?

A. He wasn't doing all the ordering. He wasn't going to after we got it set up.

Q. The testimony was he placed those [34] orders.

A. Oh, he did at the beginning.

Q. Why didn't you have them send the statement to him since he had already dealt with that firm?

A. It wouldn't make any difference to me who they sent it to. I asked him who to buy glass from and he told me the Fuller Company. It didn't make any difference if it was paid.

Q. This was paid out of Pacific Enterprises funds?

A. It wasn't paid because the glass was never sent.

Q. The rest of the construction was paid out of Pacific Enterprises funds?

A. That is right.

Q. Did you ever advise Mr. Thompson that it was paid out of Pacific Enterprises funds?

(Testimony of Joseph A. Siciliano.)

A. He must have known it.

Q. I am asking you—did you advise him?

A. By letter, no.

Q. Did you advise him any other way?

A. Just by talking that we did it through Pacific Enterprises.

Q. Can you account for the fact that it doesn't appear on the books?

A. Yes; the only reason I can account for it because of the cost to Mr. Thompson and I told the office not to bill him with anything that they were afraid of making too high or too low because it wouldn't be right. I had a lot of surplus stuff [35] around the yard and they didn't know what price to put on this stuff so they wanted Mr. Thompson and I to get together and place a price on the things.

Q. So it was estimated cost on this?

A. Yes; some of them—the reefer panels, that is right.

Mr. Phelan: I have no further questions.

### Examination

By the Court:

Q. This was to be used to serve root beer, sandwiches and no coffee?

A. It was used for root beer, sandwiches and milk.

Q. And it was used for the school trade?

(Testimony of Joseph A. Siciliano.)

A. We wanted it for the school trade because we were getting it at the Dairy Queen.

Q. Where did you get your school trade?

A. From the George Washington school—they would come up there.

Q. This location is not close to George Washington school at all?      A. That is right.

Q. It is closer to Adelupe?

A. Yes; I figured they would come down and buy.

Q. Were you thinking of the noon trade?

A. Not only noon, no; afternoon, around 3:00 o'clock, after school.

Q. Well, your school trade after school is not sandwich [36] trade, is it? I was thinking of lunch trade. Ordinarily, after-school trade isn't a sandwich trade.

A. Well, you would be surprised how many people have ice cream and root beer and soda—it is a combination.

Q. Well, you do agree that the people who buy ice cream, as a class, are not those who are interested in hamburgers and coffee and that sort of thing?

A. I certainly do. That was the reason for the milk bar—that was the idea of the milk bar.

Q. Did you have any architect?

A. I never had an architect. I was going to design it exactly like the Dairy Queen. I have done quite a bit of building and the boys know how I wanted it done.

(Testimony of Joseph A. Siciliano.)

Q. Were any plans submitted before it was built?           A. No, just——

Q. How long did you think it was going to take, Joe, to build it?

A. How long? A month and a half. As far as we could do it we would do it.

Q. A month and a half. That would bring us to the middle of August. Now, why was it never opened and used for that purpose?

A. Well, because the glass was stopped. The glass didn't come and my boys were stuck because we didn't want to change the appearance from the Dairy Queen. In order to keep it in line we needed the glass front and glass side and everything [37] else and that is the reason they stopped. The glass didn't come out.

Q. The Fuller Company is not the only company that sells glass?

A. Oh, no, but we wanted the same thing.

Q. You could have gotten the same thing from some other company?

A. Yes, but it is always best to get it from the same company that had sent it out and I didn't want to make any mistakes on that. When it didn't come out Mr. Turner or anybody else in my office didn't give orders on it.

Q. In other words, it comes back to time after time in your absence people didn't take care of things?           A. I wouldn't say that, sir.

Q. Your group just let it lie?

A. I have a large organization——

(Testimony of Joseph A. Siciliano.)

Q. If you had been here something would have been done?

A. The only reason that it was not completed was because the glass was stopped and I did not know the order was stopped until months later.

Q. Didn't anybody in Guam tell you how your businesses were getting along?

A. Oh, yes; Mr. Lyle Turner wrote and said everything was going along nicely and I got letters from Lyle Turner telling me not to worry about anything. When I phoned Mr. Thompson and found the addition was stopped on account of the [38] glass and Mr. Thompson didn't like it and I didn't call and get it. I knew Mr. Thompson didn't like it and his stockholders and I didn't push the issue. I didn't want to have a man get in trouble with his stockholders over the thing so I just let the thing drop.

Q. Now you said your initial conversation about this building was before the contract. You made provisions in that contract for the payment of \$8,000 out of profits which represented the unpaid balance?

A. That is right, exactly.

Q. Now if you had this understanding and if you know why did not the agreement provide that your cost would similarly be paid out of profits for the addition to the building?

A. Well, we had no way of knowing what the cost would be or anything else.

Q. Well, you wouldn't have to just add it to your capital account; you would have to pay it some way?

(Testimony of Joseph A. Siciliano.)

A. Well, I was going to pay it out of Pacific Enterprises money.

Q. With no understanding as to how it would be paid for?

A. Oh, when we knew how much it cost—we had no bill—because that would be it. I trusted Mr. Thompson just as he did me. I was going to go ahead and build it on his say-so. He knew I could build it very cheaply because he has seen my snack bar and other restaurant and it is a fact everything I have on [39] Guam I built myself much cheaper than any contractor or builder.

Q. The fact remains it was never used for the purpose for which it was built?

A. It was never used for that. The work was stopped.

The Court: Very well.

Mr. Bohn: No further questions.

Mr. Phelan: None at this time.

Mr. Bohn: We have here the foreman in charge of the construction.

The Court: He may testify.

Mr. Bohn: Albert, will you step forward, please?

MR. ALBERT B. PADUA

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. Albert, would you give us your full name, please?      A. Albert B. Padua.

(Testimony of Albert B. Padua.)

Q. How do you spell that?           A. P-a-d-u-a.

Q. How long have you been on Guam?

A. I have been on Guam since 1948.

Q. Where are you now employed?

A. I am employed with Jones and Guerrero.

Q. And when did you first go to work for Jones and Guerrero? [40]

A. Almost a year and a half.

Q. And where were you working prior to that time?

A. Since I arrived on Guam I was working with Mr. Siciliano.

Q. And you were working with his organization just before you went to work for Jones and Guerrero?           A. Yes.

Q. That is the only two employers you have had on Guam, is that right?           A. Yes.

Q. Now, what kind of work do you do?

A. I do the utility construction and I did the addition for the corporation of Mr. Siciliano.

Q. What was your position?

A. Construction foreman.

Q. How many men did you have working under you in 1952, roughly?

A. 14 men—sometimes eight, not less than eight men.

Q. Never less than eight and sometimes 14?

A. Yes.

Q. Did you build the present Pacific Enterprises snack bar in Tamuning with your crew?

A. Yes, sir.

(Testimony of Albert B. Padua.)

Q. You built that all yourself? A. Yes, sir.

Q. Now, calling your attention to June and July of 1952, [41] were you in charge of the construction of an addition to the Dairy Queen building?

A. Yes, sir.

Q. Who gave you instructions to start that construction? A. Mr. Siciliano.

Q. Do you recall about when that was?

A. I can recall that Mr. Thompson is with him at the time he told me to begin the construction.

Q. You mean Mr. Thompson was there when he told you to start? A. Yes, sir.

Q. You have forgotten the date?

A. Yes; I forget.

Q. What instruction was given?

A. The instruction was given to me—they even give me the blueprints of the Dairy Queen Building to follow the same exactly.

The Court: Who gave you the blueprints?

A. Mr. Siciliano.

Q. (By Mr. Bohn): Were you present at the Dairy Queen when both Mr. Siciliano and Mr. Thompson were there? A. Yes.

Q. Did you measure off the space from it the new addition was going to go?

A. Yes, sir. [42]

Q. Were they both there?

A. They were measuring there.

Q. All three of you were there together?

A. Yes.



(Testimony of Albert B. Padua.)

Q. Now, about when did you start this construction?

A. I could not tell you the exact date but I know I began plotting the foundation of that when Mr. Siciliano was still here.

Q. Would it have been about the 1st day of July, 1952?

A. Close to that.

Q. Now, do you recall how long it took you to complete that construction?

A. I think the time sheet will show. I think it's around a month and a half. I could not tell you exactly how long we built it.

Q. Did you turn the time sheets in to Henry Diza?

A. Yes, sir; at the time we finished the building I turned in the time sheet.

Q. Did you also turn in the starting time?

A. Yes, sir.

Q. Was this a continuous operation, this construction project?

A. It was continuous.

Q. And you put men on to complete it?

A. Yes.

Q. And once you got started you just kept right on going [43] until you finished, is that correct?

A. Yes.

Q. Now, did you compute—withdraw the question. I have here a list of materials which were purported to have gone into the building. Can you identify these materials as to whether they went in there?

A. Yes.

(Testimony of Albert B. Padua.)

Q. The first one is 65.33 board feet of wood for roofing support. Did that go in there?

Mr. Phelan: I don't think this is the proper proof. I think the invoices are.

The Court: It is proper proof as to the use of the material; not proper proof as to the value of the material.

Mr. Bohn: I concur with your Honor.

Q. (By Mr. Bohn): Did you put the 65.33 board feet of wood for roofing support in that building?      A. Yes, sir.

Q. Did you put 27 4 x 8 x 1/4 plywood panels in there?      A. Yes, sir.

Q. Did you put one solid door in?

A. Not only one; we had one in the partition and two in the back.

Q. So you put in three solid doors? Do you recall where you got those solid doors?

A. I got them from Pacific Enterprises warehouse. [44]

Q. So it's three solid doors?

A. One solid; the two at the back are half panels.

The Court: Are these new doors?

A. New doors; they have never been used; new doors.

Q. Did you put in eight pieces of Cellotex in the building?      A. Yes.

Q. Where did you put the Cellotex?

A. In the ceiling in the back of the partition, in across the tile, the acoustic tile. That acoustic tile belongs to Mr. Thompson.

(Testimony of Albert B. Padua.)

Q. That was on the ground?

A. No; in the ceiling.

Q. I see; you didn't put that in?

A. It's right in the ceiling now but besides the acoustic tile there is another layer of Cellotex to double it.

The Court: I don't want to interrupt counsel but my question remains at this time. There is an \$800 item here for a septic tank. Didn't the testimony show that the septic tank was essential for both operations?

Mr. Bohn: It is my understanding that the original septic tank went haywire and they had to put in another for both operations.

The Court: I think Mr. Thompson said an oil drum was put in by the original contractor. This septic tank was necessary for the operations? [45]

Mr. Thompson: Not for \$800. We spent at the new store at Seattle where they have the highest labor costs in America—we paid \$245 for another septic tank just outside the city limits, installed, and \$250 not installed in King County just three miles outside the city limits. We paid \$245 for a septic tank installed and I think the cement worker there gets about \$25 a day. This \$800 is way too high.

The Court: But the septic tank is being used?

Mr. Thompson: The septic tank is there.

The Court: The court will take a recess and I was going to ask counsel if counsel has any objection if during the noon recess I go down and inspect this building and see what this is about?

Mr. Bohn: We would appreciate it.

The Court: I notice the price sign appears to be posted on the side of this building.

Mr. Bohn: 1:30, your Honor?

The Court: Yes.

Mr. Phelan: It is perfectly all right.

The Court: We will recess until 1:30.

(The court recessed at 12:05 p.m., February 17, 1955, and reconvened at 1:30 p.m., February 17, 1955.)

The Court: The court would like the record to show in this case that pursuant to agreement of counsel, the court inspected the addition in its present state at the site of the Dairy Queen [46] and found that it consists of three rooms at the present time—one long, narrow room in the back of the addition which is used for office and limited storage, a small living room without any outside light, no ventilation, and a reasonably sizable bedroom, similarly without outside light, in which a shower has been affixed. The living quarters are air conditioned, however. But judging from the design of the addition the addition was not accessible from the ice cream portion of the operation, nor was it designed to be accessible. In other words, it was not built flush with the extension which constitutes the sales and mixing portion of the ice cream operation nor was there any door connecting the addition, nor would a door which could have been cut have been practical since the door would have had to have been inserted beyond the partition of the ice cream

sales portion of the building. I mention these things because they may be subject to explanation by the witness who is now upon the stand, but it would appear that in following Mr. Siciliano's version of the use to which this addition was to be put, that if during slack periods one person was on duty he could not have sold ice cream at one window and a sandwich at another window without going out the rear door of the ice cream portion and going in the rear door of the other building in order to serve the same customer, which would indicate again, subject to explanation, that this was to be operated as a completely separate type of business without the use of the joint facilities. Now the record will show that, [47] subject to being corrected by the testimony.

Mr. Bohn: I beg your pardon. Albert has not yet returned. However, I do have one matter to call to your Honor's attention and with your permission I will call another intervening witness until Albert has returned. He must have been delayed somewhere along the line. The matter I wish to call to your Honor's attention is that we have reached an agreement on several of the other items. Your Honor will recall, more specifically, one thing I am referring to now, item VII on page 1. Your Honor, that is \$35 a month for storage. Your Honor will recall that Mr. Thompson said that the only misgiving he had about that was the starting date. In order to avoid unduly imposing upon the time of the court and everyone else, just before the trial started I asked him if he would accept a July 1st starting

date and he said he would. I apologize, Mr. Phelan, that I did this in Mr. Phelan's absence but we were standing here.

The Court: That storage runs for how long?

Mr. Bohn: It runs from July 1 to April 2, is the date we have here, so for ease in figuring it, we run it from July 1 to April 1.

The Court: April 2, 1953?

Mr. Bohn: Nine months at \$35 per month.

The Court: That is \$315?

Mr. Phelan: \$315 is the way I figure it.

Mr. Bohn: \$315 is also the way I figure it. [48]

The Court: Very well, the item of storage which was subject to proof, will be accepted as being \$315.

Mr. Bohn: There are some small items here. Henry, would you take the witness stand?

#### MR. ERNESTO O. DIZA

was called as a witness by the plaintiff, was duly sworn and testified as follows:

#### Direct Examination

By Mr. Bohn:

Q. Mr. Diza, you have already been identified in the companion case as being the accountant for Pacific Enterprises, is that correct?

A. That is right, sir.

Q. You are still the accountant for that corporation? A. That is right, sir.

Q. You were the accountant for that corporation for the period from June 22 up to the present

(Testimony of Ernesto O. Diza.)

time, is that correct? A. That is right, sir.

Q. Now, I am going to ask you about some items. Do you happen to have with you a duplicate list of this list you gave me? A. I have, sir.

Mr. Phelan: If it please the court, I think that his memory is not the proper proof of these items. I think that the records should be brought in.

Mr. Bohn: Now, if you will just be patient, Mr. Phelan, [49] I am going to introduce some records in an orderly manner.

The Court: Yes; go ahead.

Q. (By Mr. Bohn): Now, on page 10, supplies issued Dairy Queen from Pacific Enterprises own stock. For your general information I will say to you, in order to speed up your testimony, some of those items have already been agreed to, so we will go to the first item—two gallons of imitation vanilla flavoring at \$1.43 a gallon. Do you have anything to indicate that that was delivered to the Dairy Queen?

A. I have the issue slip.

Mr. Bohn: All right, now I have here a whole series of issue slips. Do you want to examine each one of them?

Q. (By Mr. Bohn): I hand you a series of what purports to be the so-called issue slips and I will ask you to find for me the one that refers to imitation vanilla flavoring.

A. These are the disbursement slips.

Q. Where are the issue slips? Are these they?

A. That's it, sir.

Mr. Bohn: Perhaps in the interest of saving

(Testimony of Ernesto O. Diza.)

time—I have no objection to excusing the witness temporarily and let Mr. Thompson go through these issue slips if that would meet with the approval of court and counsel.

Mr. Thompson: These are slips for our own merchandise. They did not belong to Pacific Enterprises—our own merchandise. We don't have to buy them again. [50]

Mr. Bohn: Let me find this particular one.

Q. (By Mr. Bohn): Find me the issue slip, Mr. Diza, that involves two gallons, imitation vanilla flavoring.

Mr. Bohn: Again, your Honor, not wishing to impose upon your time, we are only dealing in all these series with something less than \$30. Perhaps Mr. Diza could be excused and find these slips from Mr. Thompson and show them to you and to him.

The Court: Under that general heading you are dealing with one item of \$78.

Mr. Bohn: Oh, that is true—\$78 and \$19—I temporarily overlooked that.

The Court: Now it is my understanding in these items that these were not posted to a debit account against Dairy Queen?

Mr. Phelan: That is what Mr. Diza testified in the other case if I am not mistaken. He said none of them had been posted to Pacific Enterprises books.

The Court: He said some had but I don't know just what.



Mr. Bohn: I am just embarrassed to be taking so much of the court's time on these.

The Court: You should be, Mr. Bohn. The evidence you want to present should have been organized.

Mr. Bohn: I had intended that Albert, the other boy, would get back on the stand and, therefore, it could be done. May I ask that this witness be temporarily excused and I will call Joe Meggo to the stand while he is finding these various [51] items?

The Court: Yes; I think you should have all of the records in chronological order before you present them.

Mr. Bohn: I concur, your Honor.

The Court: Very well, you may be excused, Henry.

Mr. Bohn: You may be excused, Henry, and may he remain in the courtroom to sort those slips?

The Court: Yes; there was no motion made for the segregation of witnesses in this case and I don't see any reason for it, either.

#### MR. JOSEPH MEGGO

called as a witness by the plaintiff, was duly sworn and testified as follows:

#### Direct Examination

By Mr. Bohn:

Q. Mr. Meggo, you have already been identified in the companion case as the individual who was supervising the operations of the Dairy Queen during the period from June 22, '52, to April in '53 at

(Testimony of Joseph Meggo.)

which time supervision was taken over by Norman Thompson. Now there are several items of an account which we are presenting, claiming reimbursement for Pacific Enterprises, and I desire to ask you a series of questions about some of these items. One of the items is item No. IV on page 1 of my particular list, rent for reefer truck, and the language used is, "Storage for pints and quarters (ice cream) at \$2.50 per day from [52] June 22, '52, to July 31, 1953." Now, Mr. Meggo, was there a reefer truck used in connection with the operations of Dairy Queen during the period of your supervision?       A. There was.

Q. Will you describe the truck?

A. It's a Ford truck, reefer truck, white. On it is "Harmon Field Restaurant." It belongs to Pacific Enterprises.

Q. Now the word "reefer" implies a refrigerated truck, is that right?       A. That is right.

Q. Now you said you used that in connection with the operation of ice cream, to store ice cream and to deliver it to the store?

A. Wholesale business and delivery to the store.

Q. When did the wholesale business start?

A. Oh, '53, early '53.

Q. When did it terminate if you know?

A. I don't know that.

Q. Was the wholesale business still continuing at the time you left the management?       A. Yes.

Q. And was it your understanding that it continued up through July 31, 1953?

(Testimony of Joseph Meggo.)

A. Yes; it did.

Q. Now, what sort of storage was on the premises for storing [53] pints and quarts of ice cream or any other size of ice cream except this reefer truck? A. I don't follow you on that.

Q. Well, what other storage was there at the Dairy Queen for ice cream?

A. Oh, we had a back room.

Q. And did you have any refrigeration or freezers? A. In the back?

Q. Yes. A. No, sir, in the front.

Q. Just in the front? A. Yes, sir.

The Court: You had your walk-in.

A. Well, that is just for the mixer.

Q. What freezer did you have in front?

A. A small three-door reach-in below.

Q. Three-door reach-in below?

A. (Nods head.)

Q. Was that used to capacity all of the time?

A. All of the time.

Q. And is it your statement to this court that you found it necessary for additional capacity? Is that the reason you used the reefer truck?

A. That is right; that is why we used the reefer truck.

Q. About how much ice cream did you store in the reefer [54] truck each day?

A. Oh, about two batches.

Q. Now, how much does that mean?

A. 40 gallons, 40 or 45 gallons.

Q. You would store between 90 and 85 gallons

(Testimony of Joseph Meggo.)

each day? A. That is right.

Q. This was hard ice cream, was it?

A. Yes, hard.

Q. Did you use this reefer truck every day?

A. Every day.

Q. Where was the truck kept?

A. Alongside the building.

Q. At the Dairy Queen?

A. At the Dairy Queen.

Q. Now, how much wholesale were you doing at the time you managed the store?

A. The only wholesale—we supplied Pedro Ada's stores, one in Barrigada and one in Agana.

Q. How much ice cream would you sell them during the day or week?

A. Every other day 150 quarts.

Q. And you used this truck to deliver the ice cream? A. We did.

Q. Was there any other truck or facility at Dairy Queen through which you could make these deliveries? [55]

A. No, not with ice cream. Ice cream you couldn't do that. You need refrigeration for ice cream.

The Court: Mr. Meggo, would you have needed the truck except for wholesale business?

A. No, we needed it for storage, too.

The Court: But it's primary purpose was to build up the wholesale?

A. Not exactly. We had to harden the ice cream for people to take home because when it comes out

(Testimony of Joseph Meggo.)

of the machine it is soft ice cream, so we had to store it for them.

Q. (By Mr. Bohn): Did you use the reach-in cabinet, too, for hard ice cream?

A. No, we used the reefer truck.

Q. You testified earlier that there was a refrigerator, a reach-in box, in the front of the store. Did you use that also for storage of quarts and pints?

A. We did to serve at the window.

Q. Then when you ran out of stock in the reach-in box you would replenish it from the refrigerator truck?

A. From the refrigerator truck.

Mr. Bohn: I have no further questions. I beg your pardon. I have some questions on some other points.

The Court: Aren't you going to clear up any other evidence?

Mr. Bohn: Yes, I am going over other points in the list.

The Court: I don't follow you. You don't expect to put [56] witnesses on and off?

Mr. Bohn: I misspoke myself. I want to continue with this witness and go over the other points in the complaint.

Q. (By Mr. Bohn): Now, do you recall about—withdraw that question. While you were managing the Dairy Queen store, did you have occasion to call upon the services of an electrician?

A. I did.

Q. What sort of services would an electrician perform at the Dairy Queen?

A. Well, for awhile I had to call him down when

(Testimony of Joseph Meggo.)

a fuse would go out. They had it hooked up with very poor wiring and there was a shortage that would knock the fuses out, so the inspector came there and told me I would have to change the fuse box—it was very dangerous—so I ordered one from the States. I had to keep on checking it to watch so I didn't overload the wires. When we did get the switch box, I had to rewire the building.

Q. So you had an electrician rewire the Dairy Queen building?           A. Yes.

Q. Did he install a new switch?           A. Yes.

Q. And you gave that time to the bookkeeper?

A. I did.

Q. Now, did you have occasion also to call upon refrigeration [57] mechanics?           A. Yes.

Q. What sort of work would they do?

A. The ice cream machine—the belt would expand a little bit—they would tighten it up. They worked on the walk-in reefer and the air conditioners.

Q. What would they do, for example, to the walk-in refrigerator?

A. They had to change the unit for more compression.

Q. What was wrong with the original unit?

A. It was knocking and we had to install a new compressor.

Q. That was in the walk-in box?           A. Yes.

Q. And did you give the time of the refrigeration mechanics to the bookkeeper?           A. I did.

(Testimony of Joseph Meggo.)

Q. This was all during the period that you were managing the store? A. Yes.

Q. Now, do you recall having ordered two gallons of imitation vanilla flavoring for Pacific Enterprises? A. For Pacific Enterprises?

Q. No, from Pacific Enterprises for use of Dairy Queen—two gallons of imitation vanilla flavoring?

A. I did. [58]

Q. What was that used for?

A. In the mix to make vanilla ice cream.

Q. And do you recall having ordered five rolls of mulch paper, 16 x 36? A. Mulch paper?

Q. I don't know what mulch paper is, do you?

A. No, I don't.

Q. Do you recall ordering five rolls of any kind of paper for the Dairy Queen?

A. No, we never used any paper.

Q. So you don't know what that would be? You have no recollection of that? A. No.

Q. Do you recall ordering plywood for the Dairy Queen? A. Yes.

Q. What was that used for?

A. For the extension.

Q. Where was that plywood obtained?

A. You mean on the building?

Q. Twelve pieces of plywood, 4 x 8 x 1/4—do you recall ordering that? A. Yes.

Q. Do you recall who you ordered that from?

A. PCC—Pacific Construction Company.

Q. There is also an item here—200 pounds of granulated [59] sugar—

(Testimony of Joseph Meggo.)

The Court: Do I understand that this plywood went into the extension?

A. Yes, sir.

Q. Do you recall ordering 200 pounds of granulated sugar for the Dairy Queen?

A. Well, usually we ordered direct from the Dairy Queen—excuse me—no, the powdered sugar I got from Pacific Enterprises.

Q. This is granulated.

A. Mr. Thompson, himself, ordered it. We ordered from him.

Q. So if there is a charge for 200 pounds that is wrong?

A. Well, usually—some times they run out and would have to borrow from Pacific Enterprises.

Mr. Phelan: I think this witness should testify from what he knows, not what might have happened.

Q. (By Mr. Bohn): You have no recollection of ordering 200 pounds from Pacific Enterprises?

A. No, sir.

The Court: If you had done so, do you think it is possible you would remember placing it?

A. I would remember placing it.

Q. (By Mr. Bohn): This other item is four boxes of Eagle straws. Do you have any recollection as to that?

A. Yes, four cases. [60]

Q. That was for use at the Dairy Queen?

A. Yes, for the milk shakes.

Q. Now we have another item of lacquer, dark paint, one gallon. Did you use that in Dairy Queen?

A. Yes.



(Testimony of Joseph Meggo.)

Q. What did you use it for?

A. Finishing.

Q. And what did you finish at the Dairy Queen?

A. The moldings, the little stand, the serving bar—we lacquered all that.

Q. Do you recall also ordering two loads of crushed coral for leveling in front of the store?

A. Yes, I did.

Q. What was that used for actually?

A. Every time it rained it would fill in in front of the Dairy Queen all the time so I had to bring it in and level it up a little more. That was ordered from the inspection department.

Q. Where did you get the two loads of crushed coral?

A. Koster and Whyte.

Q. Now there are some items also here with regard to the construction of a septic tank——

Mr. Phelan: If it please the Court, I believe this testimony is improper because I believe the books are the best evidence of these items.

The Court: Well, the testimony, of course, in the case [61] was that this witness was maintaining managerial supervision over this operation and the testimony is from his recollection that these items were purchased for use and, therefore, I think it is entirely competent for him to do so.

Mr. Phelan: I think it violates the better evidence rule myself.

The Court: Well, he is the best evidence if he ordered them.

(Testimony of Joseph Meggo.)

Mr. Phelan: I don't think so. I think the records would show whether they went down there or not. It is the best evidence and if the Court will note, he hasn't testified to a specific date over this period he remembers doing this. It is so vague it is impossible to pin it down.

The Court: Yes, well, outside of the plywood these seem to be ordinary supplies. Certainly the question as to whether lacquer was used should not be difficult. Certainly the light bulbs would be expected and the testimony is that the coral was required. That is not unusual at all—to level the premises. I see nothing wrong with this. He is now being asked, of course, about the cesspool.

Q. (By Mr. Bohn): Do you recall the construction of a new cesspool or septic tank?

A. I do.

Q. Can you tell the Court something surrounding the circumstances of that construction? [62]

A. We had to make a new cesspool or we had to close up. That was an order from the inspector.

Q. What was wrong at the time with the existing cesspool?

A. Too small. It couldn't take the continuous water running from the ice cream machines inside. It went back about 30 feet away from the building and set there—looked like a swamp. Nothing worked inside; the sinks were stopped up, so we had to make a new cesspool.

Q. Was that the result of a direct order from the health inspectors?           A. It was.

(Testimony of Joseph Meggo.)

Q. Who constructed it?

A. Pacific Enterprises.

Q. Do you recall anything about the dimensions or type of construction?

A. Made of hollow block cement and we built a slab on top. We had to make two entrances on it and we had to put cement on top and a manhole on top in case we had to clean it out, and a trap on it.

Q. The figure placed in this account as the cost of that item is \$800. Tell us how that figure was arrived at?

Mr. Phelan: First, you haven't shown he has any way of knowing how it was arrived at. I don't think there is the foundation to ask him what this \$800 stands for.

Q. (By Mr. Bohn): Well, do you know where the \$800 figure [63] comes from?

A. Well, no, sir. We had to hire a mixer and that was \$25 a day.

The Court: You had to hire what?

A. A small mixer, cement mixer.

Q. (By Mr. Bohn): How many days?

A. I don't know.

Q. Did you have to buy the concrete blocks?

A. Yes.

Q. Where did you buy those?

A. Joe Dupree in Tamuning.

Q. Do you recall how long it took to install this item?

(Testimony of Joseph Meggo.)

A. Oh, I would say about three weeks off and on. In rain we had to stop.

Q. As I think I understand your testimony is this additional cesspool or septic tank was required for the use and continued occupancy of the existing Dairy Queen store?      A. That is right.

Q. Out of which you were selling ice cream and other food products?

The Court: Was it contemplated that you connect the addition to it also?

A. No, we had to dig a new one altogether. We left the other one lay there. It is still there today.

Mr. Phelan: May I ask a question? You mean to say there [64] are now three cesspools down there?      A. Yes, sir.

Mr. Bohn: This witness will be yours to cross-examine soon.

Mr. Phelan: I didn't think his answer was entirely responsive to the judge's question. I wanted to clarify it before it got loused up.

Mr. Bohn: Well, there is a way to do that by objection.

Mr. Phelan: I know.

Q. (By Mr. Bohn): Mr. Meggo, it is also claimed here that certain equipment owned by Pacific Enterprises was installed and used at the Dairy Queen. The first item is a three-quarter h.p. motor, Westinghouse motor. Do you know anything about the installation of such a motor?

A. Yea, we put one in.

Q. Put it in where?

(Testimony of Joseph Meggo.)

A. In the walk-in refrigerator.

Q. In the walk-in refrigerator?

A. That is right.

Q. Where did you get the motor?

A. From Pacific Enterprises.

Q. Was there already a motor in the refrigerator?  
A. Yes, there was.

Q. What happened to the one that was in there?

A. It was burned out.

Q. What did you do with it? [65]

A. We brought it back to Pacific Enterprises to see if we could repair it. We couldn't repair it. It had to be rewound.

Q. Do you happen to know where that old motor is now?  
A. Should be up there now.

Q. As you examined it it was useless?

A. It couldn't be repaired.

Q. Now there is a note here that there is a hot fudge heater belonging to Pacific Enterprises also installed at Dairy Queen?

A. Yes, it is still there.

Q. Was a hot fudge heater ever sent out to Dairy Queen from the States?  
A. No, sir.

Q. When was the last time you were in the Dairy Queen?

A. When Norman Thompson took over.

Q. You haven't been there since?

A. Never been there since.

Q. So when you say it is in there now—it was when you left?  
A. When I left.

(Testimony of Joseph Meggo.)

Q. What is this Universal condenser?

A. It is air conditioning.

Q. What does a condenser look like? What is it, a motor-type thing?

A. It's a gadget to blow air. [66]

Q. Where was that installed?

A. Above the door, the entrance to the store-room.

Q. Was there any other condenser in the same location prior to this one? A. There was one.

Q. What happened to that one?

A. We took that back to Pacific Enterprises. It was a small one.

Q. Why did you take that one out and put in another one?

A. Because it wouldn't blow the air in. It blew hot air so we had to take it out.

Q. Do you know where the one now is that you took out?

A. The last time—at the Pacific Enterprises a week or so ago.

Q. There is another reference here to blowers. Do you have any recollection as to what that item is?

A. It is the fan that was installed in the wall or ceiling right behind the condenser to blow the cold air out.

Q. Was there a blower in there at the time you installed this one? A. Yes, there was.

Q. Why did you make the change?

A. For the reason it was blowing hot air. The condenser never got cold.

(Testimony of Joseph Meggo.)

Q. So the blower and Universal condenser were part of the [67] same operation, is that correct?

A. That is right.

Q. Again I ask you what did you do with the old blower which you took out?

A. It is at Pacific Enterprises.

Q. There is the item, air cooler evaporator. Tell us what you know about that?

A. Evaporator?

Q. Would that be an installation on the roof or what would that be?           A. I can't recall that.

Q. Air cooler evaporator—you have no recollection as to what that is?           A. No.

Q. There is another item here for a 1 h.p. deep freeee?           A. Yea.

Q. Do you recall that item?           A. I do.

Q. Now did you get a 1 h.p. deep freeze from Pacific Enterprises and put it in the Dairy Queen?

A. I did.

Q. What did you use it for?

A. Storing ice cream.

Q. Was that the deep freeze compartment that you talked about where you walked from the counter? [68]

A. No, another one in reserve in the back in the new extension building.

Q. And the last time you saw it was it still there?           A. It was still there.

Q. Did you remove any deep freeze or any other equipment and replace it with this deep freeze?

A. No, never did.

(Testimony of Joseph Meggo.)

Q. This was additional?

A. This was additional.

Q. The last item is a carrier compressor installed to walk-in reefer?

A. Well, what we did we used a carrier compressor to help out on air condition but for the walk-in reefer we only changed the compressor.

Q. In other words, there is a tie-in between the carrier compressor installed in the walk-in and the  $\frac{3}{4}$  h.p. motor?

A. No, it's for the air conditioning.

Q. This was used for air conditioning?

A. Air conditioning.

Q. And you obtained that where?

A. Outside——

Q. Where did you obtain it?

A. From Pacific Enterprises.

Q. Did you remove anything from Dairy Queen?

A. No, never did. [69]

Q. That was another addition?           A. Yes.

Q. Now with regard to this deep freeze, 1 h.p. deep freeze that you put in there. Was it a new one or secondhand?           A. Secondhand.

Q. And how about the carrier compressor installed in the reefer?           A. A used one.

Q. And this  $\frac{3}{4}$  h.p. motor?           A. Rebuilt.

Q. And what about the hot fudge heater?

A. Well, it was new.

The Court: On that point where did you get the \$101 for a hot fudge heater?



(Testimony of Joseph Meggo.)

A. Sir, I did not make the price on the hot fudge heater.

The Court: By no stretch of the imagination could it cost \$101.

A. You are right about that; I don't know.

The Court: It just involves a canister with a heating unit.

A. Yes, that is all it is.

Mr. Bohn: I have no further questions of this witness.

Cross-Examination

By Mr. Phelan:

Q. Now, Mr. Meggo, you said that the reefer truck was used [70] for storage of pints and quarts?

A. Yes, sir.

Q. I believe you said that you couldn't make enough during the day? A. That is right.

Q. So you had to store them out there. Well, when did you make them that were stored out there?

A. Between shifts.

Q. What time of the day would that be?

A. There is always four boys.

Q. I didn't get that.

A. When we break the shifts up there is always four boys there for about one hour.

Q. So you made it during that one-hour period?

A. Oh, no, if we were not busy we just continued to make quarts and pints.

Q. How many quarts and pints would you make and store a day? A. Oh, I don't know.

(Testimony of Joseph Meggo.)

Q. This was additional?

A. This was additional.

Q. The last item is a carrier compressor installed to walk-in reefer?

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Q. So you made it during that one-hour period?

A. Oh, no, if we were not busy we just continued to make quarts and pints.

Q. How many quarts and pints would you make and store a day?      A. Oh, I don't know.

(Testimony of Joseph Meggo.)

Q. Have you any idea? A. 100 or 150.

Q. How many would you store in the deep freeze in the store?

A. That I don't know—90.

Q. Now you said you made two batches? [71]

A. A batch and a half—approximately a batch and a half.

Q. And you would have 80 or 90 to store?

A. All you can get out of a batch.

Q. Isn't that your testimony?

A. Yes, approximately.

Q. That would be 360 quarts that you stored?

A. No, you can't store it all. If you have a slow day we can stock up but if you sell continuously then we can't stock up.

Q. Now how much did you get from a batch? How many quarts would a batch make?

A. I can't recall.

Q. What do you mean by a batch?

A. Well, a whole mix.

Q. Isn't it a fact that the mix was 10 gallons?

A. I can't remember—between 40 and 50 gallons.

Q. Isn't it a fact that the mix was ten gallons?

A. No, it is more than ten gallons.

Q. You are positive? A. Sure.

Q. How much more?

A. 45 or 50 gallons.

Q. You are positive of that? A. Um huh.

The Court: Let's understand what you are talk-

(Testimony of Joseph Meggo.)

ing about. [72] Are you talking about a mix for one machine?

Mr. Phelan: I mean the unit of unfrozen material going into the machine would be one batch of mix. You recharge your machine for the next batch; the liquid material to be frozen.

The Court: That is what is stored in the deep freeze, the walk-in?

Mr. Phelan: Stored in a chilled position and put in the reservoir of the machine in ten gallon batches.

The Court: That is what I am asking. Are you talking about that which goes into the machine or talking about that which is mixed.

Q. (By Mr. Phelan): Now how long a period did you sell wholesale?

A. Oh, I can't remember now. They are still selling wholesale yet today.

Q. I am asking when you were there. Did you sell any wholesale in July? A. Yes.

Q. Of '52?

A. Not '52, the late part of '52.

Q. When did you cease selling wholesale when it was under your control?

A. I can't remember that.

Q. You can't remember?

A. No, it's in '53, the year '53. [73]

Q. Do you remember what month?

A. No, I can't remember that.

Q. You sold up to some time in '53?

A. Yes, we did.

Q. You sold quarts and pints? A. Yes.

(Testimony of Joseph Meggo.)

Q. Who to? A. Pedro M. Ada.

Q. How did you sell? Was it cash or charge?

A. No, charge.

Q. How often was that paid?

A. Once a month.

Q. You said you made deliveries every day?

A. Every afternoon.

Q. How large were your orders?

A. Oh, between 125 and 150 quarts and pints every day.

Q. Would it be pints or quarts or both?

A. Both.

Q. Some packed in pints or some packed in quarts? A. 150 pieces.

Q. Now there would be twice as much ice cream if you sold quarts than if you sold pints?

A. That is right, but pieces.

Q. Now how many quarts was it divided into and how many pints? [74]

A. It all depends how much they had up there. They would check and we would replace them.

Q. Do your books show the number of pints and quarts? A. Yes, they did.

Q. How much was the price per quart and the price per pint? A. I don't remember that.

Q. The books would show that?

A. Yes, the books would show that.

Q. And that was the wholesale price?

A. That was the wholesale price.

Q. Do you know whether or not that was entered into the books? A. I wouldn't know that.

(Testimony of Joseph Meggo.)

Q. Did you receive the payments for it?

A. Well, all the signed slips I would give to the Pacific Enterprises office.

Q. Now you relied upon the books? To the best of your knowledge they were entered into the books?

A. Yes.

Q. How many quarts or pints would the deep freeze hold, do you know, that was used down there in the store? A. I don't know—80 or 90.

Q. Do you know what cubic capacity they were?

A. No. [75]

Q. The deep freeze?

A. We have two sizes.

Q. Now this used one that you brought down. Do you know the capacity of that one?

A. No.

Q. And you said that the used deep freeze you brought down was put in the extension?

A. In the extension.

Q. When was that brought down? A. '53.

Q. When in '53?

A. Well, after we finished the extension.

Q. When did you finish the extension?

A. Well, we couldn't finish it right away because we was held up for glass. We stopped work until the glass came in.

Q. Did the glass come in? A. No.

Q. Then you couldn't finish until you got the glass, just the glass?

A. Yea, we had everything else.

Q. When did you put the deep freeze in?

(Testimony of Joseph Meggo.)

A. Well, we put the deep freeze in in September, '53.

Q. About September, '53?

A. That is right.

Q. How long did you run this business? [76]

A. Since '52, since Siciliano left the island.

Q. When did you cease running this business?

A. Sir?

Q. When did you stop running the business?

A. When Thompson came in.

Q. When did he come in?

A. Oh, I don't remember.

Q. You didn't put that second deep freeze down in there until September, 1953?

A. Yea, approximately; I can't remember exactly.

The Court: I think the witness should be asked to correct his testimony. Are you talking about September, '53, or September, '52?

A. No, sir, '53—'52.

Mr. Phelan: I don't think this witness knows what he is talking about.

The Court: Well, he can very easily make a mistake in year but not in months. As I understand it you put the deep freeze in there while this building was still under construction? A. Yes, sir.

The Court: And you started constructing it somewhere around the first of July, 1952?

A. Yea, that is right.

The Court: Is it your testimony now that you put it in in '52? [77]



(Testimony of Joseph Meggo.)

A. Late '52.

Q. (By Mr. Phelan): Did you talk to Mr. Thompson when he was here around New Years of 1952?

A. Senior?

Q. Yes. A. We said "hello."

Q. You just said hello?

A. We didn't talk much more. He asked how the business was doing. I said "Fine"; that is all.

Q. Were you down there at the Dairy Queen?

A. Yes, twice I seen him.

Q. Did you discuss the additional deep freeze with him?

A. No, not exactly, no.

Q. He didn't tell you that you didn't need another deep freeze?

A. No.

Q. Were you using the reefer truck at that time?

A. It was down at the Dairy Queen, yes.

The Court: It was down at the Dairy Queen?

A. Yes, sir.

The Court: Did Mr. Thompson comment on it?

A. No, he seen it but never said anything about it.

Q. (By Mr. Phelan): At the time was the deep freeze that was installed originally in the store full of ice cream?

A. Yes, it always had ice cream in it for the store. [78]

Q. Now I am going to ask you what you used the imitation vanilla flavoring for

A. Flavoring for ice cream.

Q. Now did you use it in the ice cream?

(Testimony of Joseph Meggo.)

A. Yea, in the ice cream. All flavoring was in the ice cream except for toppings that goes on sundaes, so Mr. Thompson sent a special flavoring for ice cream and I would make it and that is why we followed his order.

Q. Why this imitation vanilla?

A. We didn't have any so we had to have something to replace what Mr. Thompson sent.

Q. Do you recall when you used it?

A. I can't recall back.

Q. Can you recall approximately?

A. Not even approximately.

Q. Can you tell me how much vanilla you used to a unit of mix?

A. Well, I can't tell—32 ounces, something like that; I can't recall.

Q. Mr. Meggo, I believe the other day you testified that you were an experienced operator of the ice cream business, that you ran the plant up at Harmon Field?

A. At Harmon Field, yes.

Q. Now how much vanilla exactly would you use in ten gallons of mix? [79]

A. You got me on that.

Q. For ten gallons of mix would you use a gallon of extract?

A. I don't know.

Q. A quart?

A. Like I say, Mr. Phelan, the idea when I came to Guam in 1949, Siciliano had Harmon Field Restaurant and ice cream plant at 20th Air Force. It was in operation. They were making ice cream. I didn't follow it by learning it up there.

(Testimony of Joseph Meggo.)

Q. You didn't see them mix it?

A. Not exactly, no. They knew how to do it.

Q. What was this mulch paper used for, Mr. Meggo?

A. I don't know what that is.

Mr. Phelan: Well, I will be honest, I don't. I presume it was some type of heavy paper.

The Court: What are you talking about now?

Mr. Phelan: This mulch paper.

The Court: I think we have to forget about that. He says he knows of no use for which paper of that size was put.

Q. (By Mr. Phelan): You say the plywood went into the extension?

A. Into the extension.

Q. How about these Lily cups, 8 ounce size?

A. Lily cups, yea.

Q. When did they go—

A. Pacific Enterprises. [80]

Q. When did they go down to Dairy Queen?

A. Since '52, the early part—July.

Q. What did they use those for?

A. On the ice cream. Well, to tell the truth the Lily cups were used for ice cream when we ran short of containers—we had to use the Lily cups.

Q. Would 8 ounce Lily cups hold any of the units that you were customarily selling?

A. We used containers and also the Lily cups.

Q. I don't follow you.

A. This ice cream mix—we used containers to serve it and the paper cups to drink it out of. That was when we were short of containers.

(Testimony of Joseph Meggo.)

Q. So you bought 200 of them.

The Court: What are we talking about here?

Mr. Phelan: I am just curious. I am just testing the witness.

The Court: Why do you want to test the witness to something that is already admitted?

Mr. Phelan: I think I have a right to test his memory.

The Court: You haven't the right to test his memory about something that isn't at issue.

Mr. Phelan: I didn't think you were held right down to issues in testing a witness' memory.

The Court: Of course you are. Why should he admit to [81] something that you admit? This item of Lily cups and what they were used for has been conceded by you.

Mr. Phelan: Yes.

The Court: We have enough other major items to go into without bothering with Lily cups which you have admitted you owe.

Mr. Phelan: I don't think the item of Lily cups is important but whether he has a good memory is very important.

The Court: Then ask him about something that is in dispute.

Q. (By Mr. Phelan): We come to equipment of Pacific Enterprises that you moved down there. This  $\frac{3}{4}$  h.p. motor was a rebuilt motor?

A. Yea.

Q. Where did you get it?

A. Pacific Enterprises.

(Testimony of Joseph Meggo.)

Q. What did you do with the motor you took out?

A. Took it back to Pacific Enterprises.

Q. Was that rebuilt? A. We tried.

Q. You mean to say you tried or who tried?

A. Our electrician.

Q. Were you present when he did?

A. He called me down to the shop.

Q. He told you? Mr. Meggo, this hot fudge heater—where did it come from? [82]

A. Pacific Enterprises.

Q. When?

A. It was loaned from Pacific Enterprises to Dairy Queen.

Q. Yes, when was it moved down there?

A. I don't recall.

Q. You don't recall? A. Well, '52.

Q. What part of '52?

A. August or September—approximately then.

Q. This Universal condenser—when was that moved down there? A. That's in '52, late.

Q. What was done with the one that was replaced?

A. Took it back to Pacific Enterprises.

Q. Did they repair it? A. No.

Q. Was the one that they brought down new?

A. Yes.

Q. How about this blower?

A. That is new, too.

Q. What happened to the old one?

A. Pacific Enterprises has it.

(Testimony of Joseph Meggo.)

Q. Was that repaired? A. No.

Q. Do you know? [83] A. Yea.

Q. Now this air cooler evaporator?

A. I don't know what that is.

Q. You don't know what it is?

A. (Shakes head.)

Q. Do you recall while you were running that place down there any piece of equipment that you didn't know what it was for?

A. What is an air cooler evaporator?

The Court: Mr. Phelan, this witness says he didn't know what it was.

Mr. Phelan: If I was running a place like that—I am asking if there was any piece of equipment down there they didn't know what it was there for.

The Court: As far as his direct testimony is concerned he says he doesn't know anything about it.

Mr. Phelan: Can I ask him if there was something down there he didn't know what it was doing there?

The Court: Well, I don't know what bearing that would have. The plaintiff hasn't attempted to prove the existence of this item by this witness.

Mr. Phelan: He was supposedly the manager.

The Court: Didn't he tell you in the first place he doesn't know what an air cooler evaporator is? He asked you if you didn't know what it was. [84]

Mr. Phelan: I don't.

The Court: Let's assume we are dealing with total ignorance as to that since I certainly don't know what it is.

(Testimony of Joseph Meggo.)

Mr. Phelan: Well, I might have seen something in a room I didn't know what it was but I could recall it was there.

The Court: Well, that doesn't help us out.

Q. (By Mr. Phelan): Now this carrier compressor?

A. We only installed a compressor and replaced a motor.

Q. And the motor was a rebuilt job?

A. And we put it in there.

Q. Now didn't you say that some of this equipment you have been talking about here was used in connection with air conditioning?

A. One more unit outside.

Q. Where is the air conditioning unit?

A. Outside the building.

Q. Outside the building?

A. (Nods head.)

Q. What does it cool?

A. The air conditioner?

Q. No, what building?           A. The salesroom.

Q. The air conditioning for the salesroom is outside the building?           A. The unit, yea. [85]

Q. Now, this septic tank—you said a new septic tank had to be installed because of overflowing?

A. That is right.

Q. Now isn't it a fact that most of the water that would go through the septic tank was merely cooling water for the freezers?

A. Yea, cooling the freezers, cooling the freezon in it.

(Testimony of Joseph Meggo.)

Q. Is it clear water?

A. Yes, it is clear water.

Q. Now why did you have to build a septic tank to take care of clear water?

A. There was a lake around the building.

Q. Wouldn't it have been possible to build a soaking pit?

A. No, it was sea level. The water was continuously coming out from the two machines.

Q. It would go out faster from or through the septic tank than a soaking pit? A. No.

Q. I thought you said it was clear water?

A. Not to them. It was slopped outside around the building and they wanted us to keep it dry. They wanted no water lying around noplac.

Q. You couldn't run clear water to a soaking pit?

A. It couldn't soak there fast enough. Mr. Thompson knew himself we had to have a cesspool. We had to dig a latrine down [86] there too.

Q. Yes, I understand that. Now you talked about the time that these mechanics were down there. How do you know how long they were there?

A. Well, they were working to put a switch board in there. I worked all night with them and we were working in the daytime, changing the wires around it.

Q. How many electricians worked there?

A. One.

Q. How do you know the reefer mechanics were down there?



(Testimony of Joseph Meggo.)

A. Well, we always called Pacific Enterprises and they sent them down.

Q. Do you remember exactly how long they were there?      A. Oh, not exactly.

Q. Did you ever have the number of hours?

A. Sometimes in the morning.

Q. Do you remember?

A. There was always a record kept in the office.

Q. You can't testify to the time at all?

A. Not the exact time.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions of this witness.

Examination by the Court

Q. I want to ask if this reefer truck was owned by Pacific Enterprises before this started?

A. Yes, sir. [87]

Q. Did Pacific Enterprises have to buy another truck to replace it?      A. No, sir.

Q. But if it was needed by Pacific Enterprises why was it available to Dairy Queen all day?

A. Well, the only time it was needed by Pacific Enterprises was when a reefer ship came in, to haul groceries and strawberries and stuff for the Dairy Queen.

Q. Did the use of it by Dairy Queen interfere in any way with the use of the truck when a reefer ship came in? Is it not your testimony it was there every day?

(Testimony of Joseph Meggo.)

A. There was no use bringing it back to Pacific Enterprises and unplugging it.

Q. If a reefer ship came in it had to be used. It was not at the Dairy Queen, was it?

A. Not exactly.

Q. The reefer truck was not at the Dairy Queen every day? A. There every day, yes.

Q. Except when a reefer ship came in or other Pacific Enterprises purposes. Again I ask you—it couldn't have been there every day? It couldn't be two places, could it? A. No.

Q. If you were unloading a reefer ship it might take you two or three days at a time?

A. No, sir, one day, sir. You could take everything off [88] the reefer in one day.

Q. Now how does this operate? How did you keep it cold—from a motor? A. Yes, sir.

Q. Hook-up? By a motor hook-up?

A. Yes.

Q. What did you do—run the motor a certain length of time? A. Continuously, yea.

Q. It cuts off automatically?

A. Maybe an hour or two every four or five hours.

Q. And then that cuts off and that gives you a freezing condition in the interior of the reefer?

A. Yes, sir.

Q. And I presume then the motor has to be run four or five hours a day, doesn't it?

A. If you open and close the door it comes on and she shuts off—it is automatic control.

(Testimony of Joseph Meggo.)

Q. You have to keep the motor going on an average of four or five hours a day?

A. The motors are built in the truck. It has a line hook-up.

Q. Is that a gasoline motor?

A. No, electric.

Q. But it must operate off the motor of your truck? [89]

A. It is a plug-in timer with an extension line on it.

Q. I see. In other words, the motor of the truck has nothing to do with it? A. No.

Q. What you do is plug in the reefer to an available electric outlet and then like any other deep freeze, the motor operates? A. Yes.

Q. But this was not acquired solely for the purpose of Dairy Queen? It was just simply making use of equipment that was already available?

A. Yes, sir.

### Recross-Examination

By Mr. Phelan:

Q. In line with the Court's question, was it ever used to haul meats to the Talk of the Town or the snack bar in Tamuning? A. No.

Q. How did you haul your meats and frozen products to the store up there?

A. A closed-in truck—it only takes five minutes.

Q. For deliveries?

A. No, sir, just for the Dairy Queen.

(Testimony of Joseph Meggo.)

Q. Isn't it a fact that if you don't operate that type of vehicle every day for a period there, she will warm up and it will take several days to cool it down? [90]

A. Sure, that is right; that is why we never shut it down.

Q. Isn't it a fact the Dairy Queen was getting a flat rate for their power?

A. I don't know. I don't know how their power bills run.

Q. Isn't it a fact that you would have kept that thing chilled down whether it was used or not?

A. Sure; that is why we keep the truck up.

Q. So you kept the truck cold at all times?

A. Yes, sir.

Q. That was not only to keep it from getting warm but also to keep it in good condition?

A. Yes, sir.

The Court: If I understand counsel's question correctly, the cost of using the truck as storage by Dairy Queen was no greater so far as Pacific Enterprises was concerned than if it had just been kept idle?

A. Yes, but if it didn't have anything to do with Pacific Enterprises, we opened the doors up and shut it down.

Mr. Phelan: No further questions.

Mr. Bohn: No further questions.

The Court: Thank you very much. You may be excused.

Mr. Bohn: Now if your Honor please, we will recall Albert Padua, the construction foreman.

The Court: Very well. [91]

MR. ALBERT B. PADUA

previously called as a witness by the plaintiff, was recalled as a witness by the plaintiff and having been previously sworn, testified as follows:

Direct Examination

By Mr. Bohn:

Q. Now, Albert, I think that at the time you were excused last time we had reached the item of two panel units, 3 feet 10 inches by—well, I had best go back—the last question that I recall was I asked you about eight pieces of Cellotex and asked you if you installed eight pieces of Cellotex in that building, in the addition?

A. Yes, sir, it was installed, sir.

Q. Now I ask you about two panel units, 3 x 10 x 6? Do you recall installing those?

A. What is that?

Q. The description we have here is two each panel (unit) 3 feet 10 inches x 6 feet 6 inches.

A. Those are the walk-in reefer panels.

Q. Where were those bought?

A. It was part of the wall of the building.

Q. Part of the wall of the building?

A. Yes.

The Court: Would you find out why they had to use reefer panels for the wall of the [92] building?

(Testimony of Albert B. Padua.)

Q. These are secondhand reefer panels?

A. Brand new.

Q. Why did you use reefer panels for the wall?

A. Well, using the reefer panels is less expensive in construction. Instead of buying material for siding, plywood for siding, we might as well use the materials we had on hand.

The Court: What page is that on?

Mr. Bohn: Let's see—it is an unnumbered page. It is about page 4 of it where I am going through the materials used. Do you find that, your Honor? Or it may be page 5 on your list. I am working from the statement of August 1, '53.

Mr. Phelan: I think it is one or two pages ahead of the one your Honor is glancing at.

The Court: Well, I don't see these reefer panels.

Mr. Bohn: Under materials used—two each panel (unit) 3 feet 10 inches x 6 feet 6 inches.

The Court: I am on the page that says "Schedule A—Explanation for Item II."

Mr. Bohn: Now I am lost.

The Court: Now how many pages is it from that? How many pages is it from the last page?

Mr. Bohn: Five from the last. This is in the explaining page; this is the basic recapitulation. In other words, as I understand this page, beginning with the item PCC invoices, etc., those are scheduled later on in detail. [93]

The Court: He is testifying now to six each, panel sidings?

(Testimony of Albert B. Padua.)

Mr. Bohn: No, he is testifying as to two each. Apparently those two items are the same, however, and I perhaps should have asked the question touching the one which shows \$50 each. The other shows \$15.

The Court: And the same size panel, isn't that right?

Mr. Bohn: Yes, one is called panel sidings and the other is called panel unit. I do not know the difference. Perhaps I should ask him if these items 3 feet 10 inches by six feet six inches are reefer panels also.

A. Yes, and reefer units we use in the windows of the building.

Q. (By Mr. Bohn): In other words, we have an item here, six panel sidings. What are they?

A. They are the ones we used in the siding of the building. They are the louvers in the siding of the building. The material we used was reefer unit panels.

Q. Is that different from what we are talking about?

A. It is different. It is solid while the unit panels, there is an opening for the unit.

Q. Oh, I see. Well, then did you install six panel sidings?           A. Yes, sir.

Q. And those are solid, you say, is that [94] correct?

Q. Did you also install two panel units?

A. Yes, sir.

Q. And those contain an opening for what?

(Testimony of Albert B. Padua.)

A. For louvers. It is in the building now.

Q. It is there now?      A. Yes, sir.

The Court: What is the difference between the \$15 and the \$50?

Mr. Phelan: A \$35 hole.

Mr. Bohn: Well, one of them provides for two and the other is six. There were six sidings installed and only two panel units, as I understand his testimony.

The Court: Yes, but each of the panel sidings is the same measurement, according to the figures here, and you are charging \$50 each for those and you charge \$15 each for the others—the same size.

Q. (By Mr. Bohn): Can you give us any explanation why one of these might be more valuable than the other?

A. The other is cheaper because it has a big opening where the unit is placed, if they are going to use it for a walk-in reefer.

Q. How big is the opening, 3'10" x 6'6"?

A. Yes, it is six inches around the side. The rest of that is the opening.

Q. Oh, I see. The unit is only a six-inch [95] frame?      A. Yes, sir.

Q. And all the material inside the unit is opening for a window?      A. Yes.

Q. The panel units were louvers for the windows and you used the six-inch frame where it remained left open, is that right?      A. Yes, sir.

Q. To distinguish that, the panel siding is solid throughout?      A. Yes.



(Testimony of Albert B. Padua.)

Mr. Bohn: Does that explanation clarify it, your Honor?

The Court: Now according to measurements, you have the same for each.

Mr. Bohn: The exterior measurement is the same.

The Court: Yes.

Q. (By Mr. Bohn): Is this the situation in the case of panel units—all you have is roughly a six-inch frame, is that correct? A. Yes.

Q. Something in the nature of a picture frame?

A. I think it is one foot at the bottom, that is all, and around six inches.

Q. So that it is six inches across at the side and top and one foot at the bottom and the rest is simply an opening? A. That is right. [96]

Q. Whereas in the case of panel siding it is solid pieces of siding? A. That is right.

Q. In other words, is 3-10 the width or height?

A. I am not sure of the height or width but I think the width is not less than 4 feet around, 4-6 or 4-7 inches.

The Court: These panel sidings are steel as I understand correctly? A. Galvanized steel.

The Court: Yes, is it necessary to put steel on the side of the panels?

Mr. Bohn: I didn't realize that they were steel.

The Court: Well, they could have used platinum but it isn't practical from the standpoint of cost.

Mr. Phelan: Between the sheets in the walk-in reefers there are layers of glass wool between.

(Testimony of Albert B. Padua.)

The Court: We haven't any evidence of their use except for siding of a building.

Mr. Phelan: They assemble these reefers by bolting these things together.

The Court: So you know something of reefer construction, but my point is why are the sidings used in connection with a building and not a reefer?

Q. (By Mr. Bohn): Can you tell us why?

A. Yes, according to my experience the Talk of the Town [97] is built of reefer panels, the snack bar is also built of reefer panels, the warehouse and office are all built with reefer panels, and that is designed for air conditioning. When instead of insulating a building for air conditioning you use reefer panels you save a lot of money by using the reefer panels in the building you are going to air condition.

The Court: You didn't have reefer panels all over the building, did you?

A. All reefer panels except the front is glass, your Honor, because that building was designed for air conditioning.

Q. (By Mr. Bohn): In other words, the insulation contained in these reefer panels is suitable for an air-conditioned room?

A. That is right, sir.

Q. It is your experience it is cheaper to build a building you intend to air condition out of reefer panels than to build it out of other material?

A. Cheaper and easier.

Q. You save labor as well as materials?

(Testimony of Albert B. Padua.)

A. Yes, sir.

Q. Now there is also contained the item of a septic tank here. Did you build a septic tank for the new addition?      A. Yes, sir.

Q. How big a septic tank was that?

A. I am not sure; I think around 8 x 10 foot.

Q. Now what material was that constructed out of? [98]

A. The siding was solid concrete. The partition was——

Q. You built that in connection with this extension?      A. That was built separate.

Q. Now that is what I want to know. How many septic tanks did you build on these premises?

A. We built one there but the construction of a septic tank has three holes in it.

Q. You only built one?

A. One big one but it has a partition of three parts.

Q. Was that built to serve the existing sales-room of Dairy Queen?

A. The only one there was constructed wrong. They opened the bottom of the septic tank. The place is very low and below sea level there is a tendency for the water to rise up and so my idea is to build a solid bottom to the septic tank. That is the reason we constructed a new septic tank there.

Q. Is it hooked into the existing building? Is it hooked into the salesroom that was there before you started the addition?

A. Which one is that?

(Testimony of Albert B. Padua.)

Q. I am trying to distinguish between the addition that was added to the building and the building that was there before you started the addition. Which building did you hook it into?

A. The old building because the new building was not used. No water was in there.

Q. So you hooked it up to the old building? [99]

A. Yes, the old building.

Q. And the septic tank you said was built wrong is hooked up to the old building, is that right?

A. Yes, and the medics required that we correct it.

Q. And it is 8 x 10, roughly and contains three compartments? A. Three compartments.

Q. Can you give us some estimate of the amount of labor that was used to construct it?

A. Around four. We had a hard time draining that place there because it is water.

Q. You mean when you started digging you found water?

A. Because that place is sea level. We had three boys taking the sand out. We dig it by hand, not mechanical way.

Q. Do you remember how long it took you to install it?

A. It took us more than one week because of the water.

Q. You don't recall how long?

A. No, I don't recall how long exactly.

(Testimony of Albert B. Padua.)

Mr. Bohn: Now if your Honor please, we have a series of invoices for the——

The Court: Listen, I think we had better take a 15-minute recess at this time.

(The court recessed at 3:10, February 17, 1955, and reconvened at 3:30, February 17, 1955.)

Q. (By Mr. Bohn): Now, Albert, before the court adjourned [100] we were, I think, down to the materials which had been purchased elsewhere. I will show you a list of materials which you furnished and attached as explanation for Item II and rather than to go over them one by one I would like to show this witness the list and ask him if all these materials went in that building.

Mr. Phelan: I must object to that. That doesn't prove anything.

The Court: You are still referring to materials used?

Mr. Bohn: That is correct, your Honor. In other words, some of these materials were taken from Pacific Enterprise, the balance were all from outside sources. We have invoices. I simply want to ask this witness whether these materials went into this job.

The Court: The objection will be overruled.

Q. (By Mr. Bohn): Albert, will you examine this list of materials and tell us if all these materials went into construction down there?

(Testimony of Albert B. Padua.)

The Court: Now what list are you talking about?

Mr. Bohn: It is Schedule A. In other words it refers to "PCC invoices (See Schedule A attached)" and I then turned to Schedule A. It starts out——

The Court: Are you putting in the invoices?

Mr. Bohn: I am going to do so, yes, your Honor. In fact Schedule A, B, C, and D are all in the same condition. We have invoices for all of [101] them.

The Court: That's beginning with lacquer?

Mr. Bohn: No, beginning with Bulletin red paint, Indian red, Trulike white and so on. Schedules B and C are on the last page; Schedule A is on the third from the last.

The Court: Now you have something intervening there that I don't.

Mr. Bohn: Well, the intervening page is the additional charges—those are for additional subsistence and that sort of thing and therefore, your Honor, we will make no further reference to the intervening page.

The Court: Very well.

Q. (By Mr. Bohn): Will you check that list and see if all that material went into the building?

A. (Nods head.)

Q. That all went into the building?

A. (Nods head.)

Q. Now was all that material charged to Pacific Enterprises?

(Testimony of Albert B. Padua.)

Mr. Phelan: I object to that because this man is not an accountant. There is no foundation laid for him to answer such a question.

Mr. Bohn: I withdraw the question.

The Court: I think the important thing is whether he bought it.

Mr. Bohn: I beg your pardon. [102]

Q. (By Mr. Bohn): Did you buy the material?

A. Not myself but my assistant foreman.

Q. In any event it went into the building?

A. Yes.

Q. Now I show you what is described here as Schedule B containing a list of materials, ball-cock lacquer, bushing and so forth and ask you if all that material went into the building?

A. I don't know what is this "slimline."

Q. What is your question?

A. I don't know what's that "slimline."

Q. Find the item for me on here. Oh, you are talking now about Schedule C. As far as Schedule B is concerned—this group ending down here totaling \$52.65—

A. Yes.

Q. Did you or your assistant order all that material?

A. Which one?

Q. All this material you just glanced at.

A. Yea.

Q. Where was that ordered from, do you recall? Was that ordered from Pedro's?

A. PCC and Calvo. The plumbing equipment was ordered by Calvo.

Q. I will now ask you to glance at Schedule C

(Testimony of Albert B. Padua.)

and ask you if all that material went in the building?

A. I don't understand that slimline. [103]

Q. You do not understand what slimline means?

A. (Shakes head.)

Q. Now I will ask you to look at Schedule D, which is three loads of crushed coral, and ask you if that went into the Dairy Queen area?

A. Yes.

Q. Now, how many loads of crushed coral altogether went into that area?

A. In the building or around it?

Q. Well, how much crushed coral went in the building or around the building during the time you were construction foreman? How much altogether?

A. I could not tell you how much altogether.

Q. Well, how much went into building the foundation?

A. Well, I think we had six loads of coral and three loads of sand.

Q. Schedule D only refers to three coral and there is apparently no sand. Now returning to—there is an item here for 95 bags of cement. Did that much cement go into the construction of that building?

A. 95 bags? I doubt it with that building. I think we only used around 50 bags.

Q. About 50 bags?

A. 50 or 60 bags, something like that.



(Testimony of Albert B. Padua.)

Q. So if 95 bags were delivered the excess was taken back, [104] is that correct?

A. That is what I don't know.

Mr. Phelan: I don't find that item at all in the cost of the additional store.

The Court: Whereabouts is this?

Mr. Bohn: Going back to the main item of materials used there is an item there for 95 bags of cement. The fifth page from the back. It is in that general heading "material used." It's that major recap that I was working from earlier, your Honor.

The Court: The last item?

Mr. Bohn: Yes, your Honor.

Q. (By Mr. Bohn): You are stating that was your best judgment as to how much cement was used there? A. 60 bags.

Q. It could not have been 95 bags, is that correct? A. No.

Q. And what was the cost of cement about that time? A. It's \$2.75, I think.

Q. \$2.75 a bag? A. Yes.

Mr. Bohn: If your Honor please, as to that item we are reducing our request to 60 bags.

The Court: How are you computing that?

Mr. Bohn: By estimate.

The Court: You are relying entirely on his estimate? [105]

Mr. Bohn: Well, I don't know any other source to find it.

Q. (By Mr. Bohn): What concrete work did you do at the building?

(Testimony of Albert B. Padua.)

A. The whole foundation.

Q. How about the floor?

A. Yes, the floor.

Mr. Phelan: I don't think we have any competent evidence in as to this building at all at this stage of the proceedings.

The Court: Well, it is extremely difficult to find, ostensibly, 95 bags charged and accounted for and then have evidence that they couldn't possibly have been used.

Mr. Bohn: I don't know how the original charged item was arrived at but in checking this list with this man during recess he said it was obviously in error; it could not have been 95 bags. I have no further questions of this witness.

#### Cross-Examination

By Mr. Phelan:

Q. As to this material you have been testifying to have you got any personal knowledge of its cost, of any of these items?

A. Yes, I have personal knowledge.

Q. Of all of them?

A. Most of them, not all of them.

Q. Do you recall as of this date what the price was of any particular item here? [106]

A. Well, like the lumber—it's 17 cents per board foot.

Q. Is that today's price?

A. No, it is when we were constructing.

Q. How much of this lumber was used?

(Testimony of Albert B. Padua.)

A. I don't know exactly how many board feet we used.

Q. Was some used?           A. All of it was used.

Q. Isn't it a fact that 17 cents a board foot was the price of new lumber at that time?

A. That was new lumber we bought from PCC.

Q. I thought you said you used used materials in the building?

A. I never said used materials in the building.

Q. Did you use any material in that building that had been used before?

A. That had been used?

Q. Yes.           A. No.

Q. It was made out of brand new material, the entire building?

A. It is not exactly brand new.

Q. What was it then?

A. Like the door—it has never been used because we bought it from surplus. It had been lying there six months. It is not brand new yet. [107]

Q. You bought your surplus where?

A. That was in this Guam Department lumberyard deal with Mr. Siciliano.

Q. Isn't it a fact that they bought and dismantled surplus buildings at the Army?

A. They never dismantled. It was new surplus.

Q. It was not——

A. Any material—it was not surplus building—any material can be surplus material.

(Testimony of Albert B. Padua.)

Mr. Phelan: I think the court remembers that lawsuit.

The Court: I don't.

Mr. Phelan: It was in this court.

The Court: It never came to trial.

Mr. Phelan: Never came to trial? I thought a judgment was entered in that suit. I was not a party to it but I remember it being filed.

The Court: No.

Q. (By Mr. Phelan): Now you said you had no plan for the snack bar, no blueprint to build by?

A. For what building?

Q. For the snack bar.

A. Which snack bar?

Q. The one down at Anigua.

A. There isn't any snack bar.

Q. What did you build there? [108]

A. Well, according to Mr. Siciliano when he directed us to build it, it is for selling popcorn, like that.

Q. What did you build down there?

A. A building.

Q. Did you have blueprints for that?

A. I had blueprints of the original Dairy Queen building to be followed.

Q. Do you know the size of the original Dairy Queen building?

A. I don't remember it now.

Q. You know its shape?

A. I know its shape.

Q. What is the shape?

(Testimony of Albert B. Padua.)

A. Well, it's somewhat—in the front——

Q. Do you know the shape of it?

A. I don't know.

Q. But you have seen it?

A. I have no description of the shape. I have seen it.

Q. You don't know whether it is circular, triangular or oblong?

A. I can describe a building which is square but I don't know how to describe it rounded on the end.

Q. On the building you built how would you describe it?

A. Well, it wasn't exactly the same, the new building—it was attached and that is why right on the end of the building [109] it was not followed.

Q. So you built that building from the plans for the original Dairy Queen?      A. Yes, sir.

Q. You had no independent plans?

A. Yea, you could not just follow the plan if the alterations call for it.

Q. How did you know what the alterations would be if you had no plan?

A. Because the alteration was it was to be attached to the old building. It was to be on the right side of the building. It wouldn't be the same. We followed the plan except for roofing on the right because it is attached to the old building.

Q. Has the new building got the same shape as the old building?

A. The same shape but not the same length.

(Testimony of Albert B. Padua.)

Q. Are the partitions inside in the same place?

A. It's almost the same partition.

Q. Is the new building as deep as the old building?  
A. What do you mean by "deep"?

Q. Front and back.

A. Well, I think we had—the old building was wider in the front—in the floor space, I mean to say—than the new one we have.

Q. You built the new one identical to the old one? [110]  
A. It's identical.

Q. And from the same set of plans?

A. (Nods head.)

Q. Now did you, when you built that, provide electrical and plumbing outlets or outlets for the freezers used in the Dairy Queen business?

A. We put an outlet there but I don't know what it was for.

Q. Where did you put the outlet?

A. Right in the partition; there is an outlet in the partition but we use it for a fan.

Q. For a fan? A. Yes.

Q. What current does it use? A. 110.

Q. Did you provide for water for cooling the machines the same as in the original Dairy Queen building?  
A. We didn't provide that.

Q. Did you provide any floor drains?

A. Yea, there is a floor drain.

Q. Now how long did it take you to build this building?

A. Well, I don't know exactly how long we built it.

(Testimony of Albert B. Padua.)

Q. Approximately?

A. I think it's a month or more.

Q. And you supervised it? [111]

A. Yes, sir.

Q. You were down there every day? What was the day that you started that building?

A. Oh, I don't exactly remember what day.

Q. What year was it?

A. I might be wrong, maybe. I could not assure you what year; I forget.

Q. What month?

A. Not even the month; I don't recall.

Q. You don't even know the month. Now how long after you were told to start that building was it before you started to work?

A. Oh, we started right away.

Q. The same day?

A. Yes, sir, we started right away.

Q. Who told you to?           A. Mr. Siciliano.

Q. What did he say to you?

A. Well, he give me the plan. He told me to follow the plan the same with the glass we had in front in the old Dairy Queen and he showed me some alterations in the plan. The partition should be a little closer, like that.

Q. And what did he say the building was to be?

A. I think he told me he was going to sell popcorn there if I remember. [112]

Q. Did he provide any electrical wiring to hook up a popcorn machine?

A. Yes, we had an outlet there.

(Testimony of Albert B. Padua.)

Q. How many outlets did you put in there?

A. We put four outlets.

Q. Did you ever complete the building?

A. We completed it except putting the glass on.

Q. Was that all that remained to be done?

A. Yes, sir.

Q. The plumbing was in?

A. The plumbing was in.

Q. All the wiring was in?

A. The wiring was in.

Q. Now what was that wiring in that extension? Was it 110 or 220? 110 or 220? Which one was it? What kind of power did you put in the new building?

A. The new building?  
Q. Yes. A. It was 110.

Q. Now, was Mr. Siciliano still on Guam when you started construction?

A. He was still here.

Q. He was still here. Now you said this morning you had used some acoustic tile at the Dairy Queen?

A. Yes. [113]

What other material down at the Dairy Queen did you use?

A. That is the only material because he wanted it to be the same as the old Dairy Queen—the acoustic tile.

Q. How old was the old Dairy Queen at that time?

A. Not so old.

Q. You didn't use any plywood that was down there on the jobsite?

A. No.

Q. Any Cellotex?

A. No Cellotex.



(Testimony of Albert B. Padua.)

Q. There were no materials down there except acoustic tile? How much acoustic tile?

A. How much acoustic tile?

Q. Yes.

A. I don't know the price because we were not the one who bought it.

Q. How much tile? A. I don't remember.

Q. How big an area did you cover with this tile?

A. I think it's 14 by—I don't remember.

Q. You don't remember yet you could look a little while ago at a list almost two pages long of items going into that building and you could remember each one of those was issued?

A. That is different.

Q. You just remembered; you never forget; but a period of [114] months you could forget. When was the last time you saw that list?

A. Which one? Of Dairy Queen?

Q. Yes. A. Just now.

Q. Was that the first time?

A. Not the first time.

Q. When was the last time?

A. They were reading it to me when we had a recess.

Q. That is the first time you saw the list was at the recess? A. Yes.

Q. And you are positive every item on that list went into the building? A. Yes, sir.

Q. Yet you don't know how much an area of the building was covered with acoustic tile?

A. That's different.

(Testimony of Albert B. Padua.)

Q. If at recess I had showed you how much was covered with acoustic tile could you now testify what it was?      A. I could not assure you.

Q. But after showing you a list this afternoon at recess, you are positive of what the building was constructed?      A. Yea.

Q. Now you said the building was constructed out of reefer [115] panels because it was going to be air conditioned. Isn't it a fact the front of the building was going to be completely glass?

A. Yes, sir.

Q. Isn't it a fact that the double doors in the back were going to be screen doors?      A. It is.

Q. Isn't it a fact that up above you put louvers up above and around the building so it would be easier to convert to air conditioning? You did put louvers in?

A. I did just in case it wasn't air conditioned.

The Court: Do I understand your answer to be you didn't put the reefer panels in because it was going to be air conditioned but you put them in there in case it ever should be air conditioned?

A. Just in case, sir.

Q. (By Mr. Phelan): Did anybody ever tell you it would be air conditioned?

A. Nobody ever told me.

Q. Did you ever make any preparations so that air conditioning could be installed in the building?

A. It was easy—no preparation, but it is easier to make.

Q. It is easy to cut a hole in the steel?

(Testimony of Albert B. Padua.)

A. With the panels we could do it—eliminate the louvers.

Q. Where did you put the panels?

A. In the back. [116]

Q. Didn't you just tell us that it was the front that was going to be air conditioned because there was an air-tight door there? What part of the building was going to be air conditioned?

A. The front part or back part; it doesn't matter—as long as you open the door, the front part is air conditioned.

Q. You are positive that all of this material was used in the building? Let me ask you how you explain this one entry: It says here, "Quantity, 1; unit, pieces; 2 x 12 x 14 wood; unit price, \$.18," and they have a price of \$5.04 on that, which obviously indicates there is more than one piece. Now which is correct?

A. I will tell you the place we put it.

Q. Please do.

A. We put it in the ceiling of the front glass, the front extension, top ceiling.

Q. I thought you said you didn't have any glass?

A. It is preparation for glass.

Q. How many pieces did you use?

A. 1, 2, 3, 4—we even had it in the yard—we used 5 of it.

Q. When you went over this list you didn't notice the fact that only one showed on the list?

A. What's that?

Q. When you went over that list you didn't notice the fact [117] that only one showed on the list?

(Testimony of Albert B. Padua.)

You said you used five but only one is on the list.

A. I just told you—we had some and we used it.

Q. Do you know whether that was bought or not when it came down?

A. Well, it was bought for it.

Q. How do you know?

A. Well, Mr. Siciliano——

Q. You took it for granted he bought it?

A. Yea, I was working with him and I was the one who took it.

Q. Did you see him buy it?

A. That is what he told me; I wouldn't just be stealing it.

Q. Now, how much of this other testimony you have given me today is based upon what somebody told you?

A. Well, he is my boss. What he tells me is what I am going to do, what I believe.

Mr. Phelan: That is right—what he says is so. I have no further questions if it please the court.

Mr. Bohn: I request the court for permission to ask this witness some questions which are not proper redirect examination. They are involving labor in this building, which I neglected to ask when I had him under direct examination before.

The Court: Go ahead and ask him.

Mr. Phelan: I don't see that it has any value, but if you [118] want to waste the time, go ahead.

(Testimony of Albert B. Padua.)

Redirect Examination

By Mr. Bohn:

Q. Albert, do you remember the names of the boys that you used down there as employees and workmen?      A. I remember some of the boys.

Q. Did you use Simeon Bandong, B-a-n-d-o-n-g?

A. There is some more there.

Q. Well, did you use him?      A. Yea.

The Court: Are you going over each of the workmen individually?

Mr. Bohn: Well, the probability is, we are put to proof. I can show him the list and ask him if each one of these men worked there.

Mr. Phelan: That is not competent proof. Your records are the proof.

The Court: Give him the list and ask him if those men worked on the job.

Q. (By Mr. Bohn): Did those men work on the job the period set forth opposite their names?

The Court: Well, now, he can't testify as to the periods, obviously. This happened back in 1952. Presumably you have time records showing the periods they worked.

Mr. Bohn: Well, we can produce secondary evidence. I [119] don't think our time records get to each day as to each particular man.

The Court: You can't expect this man who testified he had a crew of 14 working on the building—you wouldn't expect him to remember back to 1952, the exact hours worked by each man.

(Testimony of Albert B. Padua.)

Q. (By Mr. Bohn): Well, I should perhaps put the question another way and that is this: Was this a continuous job that you put a certain crew on from the day you started and you kept those men on until you finished?

A. Oh, yes, it is a continuous job.

Q. This is not a situation where you had men on a few hours and then shipped them to another job, is that correct?      A. No.

Q. And how long did this job take, approximately?      A. More than a month.

Q. About how much more than a month?

A. I don't remember, but I know it's more than a month.

Mr. Bohn: I have no further questions.

#### Recross-Examination

By Mr. Phelan:

Q. Did you work down there at all yourself?

A. Yes, sir.

Q. How many men worked?

A. Sometimes we had seven.

Q. Do you remember how many men worked there on any one [120] day?      A. No.

Mr. Phelan: I have no further questions.

Mr. Bohn: None—no further questions.

#### Examination

By the Court:

Q. Now, tell me this: You built the addition on the Dairy Queen?      A. Yes, sir, your Honor.

(Testimony of Albert B. Padua.)

Q. How would you get from the front of Dairy Queen to the addition if you were in front, as you described the round place? A. Yes, sir.

Q. How would I get from there into the addition? A. I don't get it.

Q. If I wanted to go from that round place—in other words, where the machinery is and where the ice cream is sold—over to the addition, how would I get there?

A. We had a back door in the new building.

Q. I would have to go out the back door of the Dairy Queen?

A. Yes, and the back door of the addition.

Q. And I would have to come in by the back door of the addition? A. Yes.

Q. There was no way for anybody to go from the old to the addition on Dairy Queen except to go out and in the other door?

A. Except to go in the other door. [121]

Q. No provision was made except to go outside. Was that the plans that were given you?

A. The original plans of Dairy Queen—there is a door on the side of that, your Honor.

Q. I think that is correct but we are talking about one operation here. In other words, there was no way—now follow me just a moment—you have the sales section of the ice cream place; it stands out from the other building—you built your addition so that it was just one big building in back and then the sales place for ice cream. Now if you were selling sandwiches in the addition and selling

(Testimony of Albert B. Padua.)

ice cream in the Dairy Queen one man couldn't sell you ice cream one place and sell you a sandwich in the other place without going out the back door and coming in the other door, could he?

A. The reason why we didn't put any door between the two buildings, your Honor, because the shelf is more important than opening a door there because the door of the new building is very near to the old building so they didn't advise putting a door there between the buildings.

Q. So you didn't intend anyone should go from the Dairy Queen into the new building?

A. No.

The Court: That is all I have. Thank you.

Mr. Bohn: No further questions. Now, on our next witness, if your Honor please, we will recall Mr. Diza. [122]

The Court: Very well.

### MR. ERNESTO O. DIZA

previously called as a witness by the plaintiff, was recalled as a witness by the plaintiff and having been previously sworn, testified as follows:

#### Direct Examination

(Continued)

By Mr. Bohn:

Q. Now, Mr. Diza, when you were on the stand before we were asking you about a series of questions and you were asked by the court to get these vouchers and so forth in order. If your Honor



(Testimony of Ernesto O. Diza.)

please, I am going to start this series of questions on page 2, beginning with the item for maintenance, No. IX, running down through those supplies. Now, you are the bookkeeper for Pacific Enterprises, is that correct?       A. That is right.

Q. There is attached to this a claim against American Pacific Dairy Products of an item for one electrician at \$1.82 an hour for 70 hours. Can you find any timecards for that individual?

A. This is the timecard for the electrician.

Mr. Phelan: You said you are starting on page 2. Now, what page do you actually mean? Actually the third page, I think. It is page 3, is that correct?

The Court: These pages are not even numbered, are they?

Mr. Bohn: No; the pages are not numbered. Page 1 is—— [123]

The Court: This is actually numbered page 2.

Mr. Bohn: Oh, yes, at the top.

Q. (By Mr. Bohn): The timecards which you have just identified are described as electrician's time record for services rendered to Dairy Queen?

Mr. Phelan: Wait a minute before you read those. Are you going to offer those in?

Mr. Bohn: Yes.

Mr. Phelan: I object.

Mr. Bohn: I haven't made the offer yet.

Mr. Phelan: I want to stop you from reading them.

The Court: What is this?

(Testimony of Ernesto O. Diza.)

Mr. Phelan: I am objecting to these timecards. They don't mean anything. They are not proper timecards. This man didn't even look. He just said, "This is the timecard of an electrician."

Mr. Bohn: Now, just a moment. You haven't given me the opportunity to properly identify what I am going to offer into evidence. I think I am entitled to the courtesy of an offer. Should the judge determine the offer is improper, the objection will be sustained.

The Court: That is correct. Continue.

Q. (By Mr. Bohn): I show you a series of pages each headed "Electrician's Time Record." What does the "D.Q." stand for? [124]

A. Dairy Queen.

Q. And each contains a date and the number of hours, is that correct? A. That is right, sir.

Q. And were these kept by you?

A. That is right, sir.

Mr. Bohn: I now offer these in evidence as plaintiff's exhibit next in order.

Mr. Phelan: I object to them.

The Court: Let me see the exhibits and then we can make inquiry as to whether they were posted to the debit account of the Dairy Queen. Did you ever post these anywhere?

A. I posted the statements, your Honor.

The Court: Did you ever post them to an account due?

A. No, your Honor.

The Court: You mean Pacific Enterprises paid

(Testimony of Ernesto O. Diza.)

for these but you never showed them as being charged to Dairy Queen on your books?

A. No, your Honor.

The Court: Why not?

A. Well, I have no instructions to charge Dairy Queen but I keep the time.

The Court: Well, you didn't keep this time, did you?

A. Well, the electrician give the time record every time he go to Dairy Queen. [125]

The Court: This was a time sheet turned in by the electrician?

A. Yes, sir.

The Court: I think this is the plaintiff's first exhibit.

Mr. Bohn: I am sorry; I was confused with the other case.

Q. (By Mr. Bohn): I show you what purports to be timecards of a similar nature for "Reefer Mechanic's Time Record for Services Rendered to D.Q." I show you these and ask you if you recognize these?

A. These are the reefer mechanic's time record.

Q. Whose signature is on the bottom of these?

A. C. M. Albanez and V. Gatdul.

Q. Those are the men involved?

A. That is right, sir.

Mr. Bohn: I now offer these in evidence as Plaintiff's Exhibit No. 2.

Mr. Phelan: I object to these—the same objec-

(Testimony of Ernesto O. Diza.)

tion. I don't think they are timecards at all, anyhow.

The Court: Time slips turned in by the individual and tied in with the statement of Mr. Meggo whose claim is that he knew that the work was done.

Mr. Phelan: Well, I am curious if they are timecards turned in by the individual why there are some blank ones stapled in the middle of this group, too.

The Court: Well, you will have the opportunity to examine [126] them. They will be received. Proceed.

Q. (By Mr. Bohn): Now, turning to the item, "Supplies issued to Dairy Queen from Pacific Enterprises own stock," I will ask first of all for you to find for me the item——

Mr. Phelan: Well, now, what is this you have just introduced? You have got reefer mechanics "A" and reefer mechanics "B." What do you mean by that?

Mr. Bohn: Well, apparently there is one heading "mechanics" and two mechanics and the time for both of them was kept on the same cards that we have just introduced.

Mr. Phelan: Well, did both of these men make the same pay?

A. No, sir.

Q. (By Mr. Bohn): Mr. Albanez, the first mechanic—how much does he make?

A. \$300 a month at Pacific Enterprises.

(Testimony of Ernesto O. Diza.)

Q. And how much is that an hour?

The Court: Let me see that Exhibit 2.

Q. (By Mr. Bohn): What does the other mechanic make?

A. I think he makes \$300 a month.

Q. Plus subsistence? A. (Nods head.)

The Court: Now, this Plaintiff's Exhibit 2, is this not inadequate to proof the time put in by an hourly workman?

Mr. Bohn: Your Honor, I didn't hear the balance of your [127] statement because of aircraft.

The Court: You have what appears to be October, '52, and then you have 6, 10, 14, 16, 22 and 30 and opposite you have 3, 2, 4, 7, 12 and 7; total 35 hours, and then signed, ostensibly by someone. Well, an hourly worker doesn't keep his time on this kind of basis, nor do we know whose this second signature is.

A. It is Solina, John A.

The Court: Who is he?

A. Well, he is employed by Pacific Enterprises and he went home already.

The Court: Why is his signature on here?

A. Well, just to certify that he worked there as a reefer mechanic.

The Court: How does he know whether he worked there?

A. I beg your pardon?

The Court: How does he know whether he worked there or not?

(Testimony of Ernesto O. Diza.)

A. He worked there because he signed it and the reefer mechanic is here also on Guam today.

The Court: Well, I am going to accept this but I certainly do not think that that is the way to prove the work performed by an hourly worker.

Mr. Bohn: May I examine that?

The Court: Certainly. An hourly worker must turn in his time each day. [128]

Mr. Bohn: I don't think there is any question about that. I want to ask a few more qualifying questions. May I now?

Q. (By Mr. Bohn): Each of these slips contains at the top what purports to be the month. The first one says October. Immediately after there is a "6." Is that October 6? A. Yes.

Q. And the total opposite there is the hours—3—does that mean he worked three hours that day?

A. Yes; that is right, sir.

Q. Now, how did that get there? Who put it there? A. Mr. Albanez.

Q. He put it there himself, is that correct?

A. Yes; that is right, sir.

Q. Is the same testimony true on each of these hours and dates? A. That is right, sir.

Q. And you required each of the men to sign these as charges, is that correct?

A. That is right, sir.

Q. And one of the mechanics is still on the island available? A. That is right, sir.

Q. Now, Mr. Diza, under supplies issued to Dairy Queen from Pacific Enterprises own stock

(Testimony of Ernesto O. Diza.)

we have an item for 2 gallons imitation vanilla flavoring, \$1.43 a gallon. Do you find any [129] voucher or written evidence of the existence of that amount?       A. This is.

Q. Now, I show you what is dated 8/2/52 and purports to be a delivery slip to the Dairy Queen containing a good many items. Two of the items contain after them "P.E.I." and I will ask you what those notations mean?

A. Pacific Enterprises, Inc.

Q. And what are those two items?

A. This is the two gallons of imitation vanilla and four bottles of nuts.

The Court: Now, I don't understand this. These are among a number of other items?

Mr. Bohn: I was just going to ask some other questions. This is a list of many items and I was going to ask him—the other items are matters delivered to Dairy Queen but from the Dairy Queen's own stock. They are all contained on the same common slip. That is why I am qualifying these.

The Court: You mean Pacific Enterprises mingled their stuff with Dairy Queen's?

Mr. Bohn: Not mingled. Where it came from was marked Pacific Enterprises separately.

The Court: You made no separate charge for what you sold to Dairy Queen?

Mr. Bohn: They are contained on one slip. It is not a charge slip; it is a delivery slip. [130]

Mr. Phelan: How can you construe that to be an invoice especially when the same man is keeping

(Testimony of Ernesto O. Diza.)

the books and it is out of the same warehouse on the same tally out? I can't see it.

Mr. Bohn: Well, I appreciate the fact that you can't, Mr. Phelan, but if it is noted——

The Court: Well, now, Mr. Bohn, what kind of business are we talking about? You are here suing on behalf of the corporation for what you furnished. Now you are offering evidence of what it delivered, part of which was already owned by the defendant.

Mr. Bohn: That is no question whatever——

The Court: Do you have any charges made in proper form for these deliveries to the defendant and delivered to the bookkeeper to be posted as charges against the defendant?

Mr. Bohn: If you mean do we have any entries in proper form, there are separate slips. I will ask this witness: Do you have any separate charge slips?

The Court: Yes; charge slips is what we are interested in.

Mr. Bohn: In my theory, after proving delivery, it would then allow them the reasonable value.

The Court: If you have your charge slips. You can show the charge slip and then that the item referred to on that was delivered.

Q. (By Mr. Bohn): Do you have any charge slips?

A. No, sir; these are all delivery slips. [131]

The Court: In other words, the only control you have is the delivery slips, is that right?

A. That is right, your Honor.



(Testimony of Ernesto O. Diza.)

The Court: And you delivered stuff that belonged to Dairy Queen and you delivered stuff that belonged to Pacific Enterprises?

A. That is right.

The Court: And if it belonged to Pacific Enterprises you made a note "Pacific Enterprises" on the slip?

A. That is right.

The Court: And that is why you know that Dairy Queen owed Pacific Enterprises?

A. That is right.

The Court: And you didn't post these to any book?

A. No, your Honor.

The Court: Well, I think I have gone about as far as I can in accepting that kind of proof in the creation of a book obligation.

Mr. Bohn: Well, I can hardly contend that it is the proper way to keep books. I am only seeking to prove the fact of delivery and requesting the reasonable value. I cannot successfully contend that it is the proper way to keep books.

The Court: I think you had better forget about it if it is represented by that kind of a transaction because, obviously, if the plaintiff in this case intermingled its affairs to that [132] extent, it can't expect the court to accept this type of evidence of anything. All that is required to justify that is to take a slip of any kind and put "P.E.I." after it and it would be a charge against the Dairy Queen.

Mr. Bohn: As I say, I cannot successfully con-

(Testimony of Ernesto O. Diza.)

tend that this is the way to handle the books, your Honor.

The Court: I think that is right and, furthermore, I wouldn't try it.

Mr. Bohn: Very well, with your Honor's permission I will abandon the line of questioning on that particular subject.

Q. (By Mr. Bohn): Now, Henry, you have some other vouchers there. I am turning now to the items referred to in Schedule A, if your Honor please. The previous testimony has been that the material went into the building. That Schedule A is the third from the last page. Now, would you examine Schedule A, please, so that you may identify what I am talking about? Where was this material purchased?

A. We purchased from PCC, some from Pedro, some from Marianas Sports and some from Guam Amusement Company.

Q. Now, is that limited to Schedule A or Schedules A, B, C and D?

A. Yes; that is three schedules.

Q. Let me put it this way: Were the items on Schedule A all purchased from one supplier?

A. You can check with this figure. [133]

Mr. Bohn: Well, apparently items from Schedules A, B and C were all purchased from different suppliers. I will therefore ask you to identify—to glance at Schedules B and C and I will ask you if you have vouchers for that material as well?

A. (Nods head.)

(Testimony of Ernesto O. Diza.)

Q. (By Mr. Bohn): These are the vouchers?

A. That is right.

Q. Now, do you know what a slimline is? Can you find a voucher for a slimline? Try to keep those in order if you can.

The Court: How much is the amount?

Mr. Bohn: The item is \$39.50.

Q. (By Mr. Bohn): Do you know what a slimline is? A. No; I don't know.

Mr. Bohn: I think we will abandon this.

The Court: Well, I don't see any objection to putting it in.

Q. (By Mr. Bohn): All right, now, you have vouchers for all of these items, is that correct?

A. That is correct, sir.

Mr. Bohn: Well, I will offer them all in evidence.

The Court: Those are vouchers of your purchases supporting your Schedules A, B, C and D?

Mr. Bohn: That is correct; they are the purchases from outside sources. [134]

The Court: Other sources. Now, are you going to put on evidence to show the value of your service, the value of the used parts and so forth?

Mr. Bohn: I have presented all of the evidence.

The Court: That you have purchased?

Mr. Bohn: I have no further evidence on that, your Honor. I can put Mr. Siciliano on.

The Court: How do you expect to prove a reasonable value of a reefer plant, for example?

(Testimony of Ernesto O. Diza.)

Mr. Bohn: I can have Mr. Siciliano testify as to that.

The Court: You have a used deep freeze.

Mr. Bohn: I can ask him where those figures came from. I can put Mr. Siciliano back on.

The Court: Maybe Henry knows where he got up the figures if he made up that report.

Q. (By Mr. Bohn): Where did these figures come from? I am talking about a  $\frac{3}{4}$  h.p. Westinghouse motor. A. That is on——

Mr. Phelan: I object to any of these coming into evidence, your Honor. They have no more probative value than those other ones.

Mr. Bohn: I suggest you show them to the court and let the court examine them.

The Court: They tie in with the testimony here that the material was used. [135]

Mr. Phelan: I think if the court would look at them, the court might——

The Court: I will receive these as material going into the building.

Mr. Phelan: They could equally have gone into any other building.

The Court: I don't think it makes too much difference. We are going to have to generalize as to the value of that building, anyhow. I don't think specific costs are going to mean very much to us.

Mr. Phelan: I don't think they mean anything.

Mr. Bohn: I offer those in evidence.

The Court: Yes; they will be received as Plaintiff's Exhibit No. 3.

(Testimony of Ernesto O. Diza.)

Q. (By Mr. Bohn): You say the  $\frac{3}{4}$  h.p. motor was included in the outside purchases, is that correct? A. That is correct.

Q. Now, you have \$101 for a hot fudge heater?

A. That is right, sir.

Q. Where was it purchased, do you remember?

A. From the States.

Q. Was it purchased by Pacific Enterprises?

A. That is right, sir.

Q. When was this purchased, Henry?

A. Oh, I would say way back from Harmon Field. [136]

The Court: Was it used at Harmon Field? Was it used?

A. Yes; used.

The Court: And you charged them at the invoice price?

A. That is right, sir.

The Court: Did you do that with everything else whenever you had used equipment charged them or did you charge them a new price?

A. No; same price, your Honor, same invoice price.

The Court: It was the new price, wasn't it?

A. Yea.

Q. (By Mr. Bohn): Now, a Universal condenser—you have an item of \$25. Where did you get that \$25 item? A. Universal condenser?

Q. Are all these prices invoice prices?

A. I presume they are, Mr. Bohn.

(Testimony of Ernesto O. Diza.)

The Court: When did you set these prices, Henry?

A. I go by the invoice.

The Court: When did you do it?

A. August, 1953, your Honor.

The Court: You just took the item and you figured out what its value was, its new value?

A. From the invoice.

The Court: From your invoice?

A. That is right.

Q. (By Mr. Bohn): You did not seek to value them in their [137] condition at the time they were turned over, is that correct?

A. I beg your pardon?

Q. In other words, you used your cost on all these items? A. That is right.

Mr. Bohn: I have no further questions of this witness.

Mr. Phelan: I have a couple.

### Cross-Examination

By Mr. Phelan:

Q. Henry, you have the timecards of these electricians. What do they get paid an hour, do you know? A. Well, they get paid by the month.

Q. What is the normal work week?

A. Eight hours.

Q. Eight hours a day? A. That is right.

Q. And how many days a week?

A. Six days a week.

(Testimony of Ernesto O. Diza.)

Q. 48 hours a week? A. That is right.

Q. What does your first man get paid, your electrician?

A. They get paid by the month, \$250.

Q. He received \$250 a month?

A. That is right.

Q. How about the reefer mechanic?

A. The reefer man is \$300. [138]

Q. What did the men who worked—I believe I have the names here—on the building, that addition down there, get? There was Simeon Bandong, Mariano Vinoya, Celestino Vinoya and E. Sibonga. What did they get a month? I could show you these men—what was their rate of pay per month?

A. Mr. Simeon Bandong get \$125 a month and Mr. Vinoya \$100 a month. Mr. E. Sibonga received \$125 a month, the same as Mr. Bandong.

Q. Now, which man was the \$100-a-month man?

A. This man.

Q. Now, the men who did this work presented to you their timecards once a week or when?

A. No; they give it to Mr. Gregorio, I think, sir.

Q. Who is Gregorio?

A. He is the clerk in the office. I don't know if they present any timecard or maybe the foreman submitted the statement of the days they worked and the hours they worked.

Q. And this clerk puts them on these slips?

A. (Nods head.)

Q. Do these slips go out of the office or are they kept in it?

(Testimony of Ernesto O. Diza.)

A. Well, I say, Mr. Phelan, when they are off they just go to the clerk and tell him.

Mr. Phelan: I don't think there is any slip here.

A. That is the electrician and reefer [139] mechanic.

Q. (By Mr. Phelan): Oh, on these other men there is no slip? A. No.

Q. The electrician and reefer mechanic—do they turn a slip in daily?

A. I don't know exactly but Gregorio could tell how they give the timecard to him.

Q. So you don't know whether or not he makes the entry on what they tell him or he makes the entries from the timecards? A. No, sir.

Q. Now, there was no timekeeper on the job, I take it, then? No man on the job with the assigned duty of keeping track?

A. You mean on the construction?

Q. Or if you were doing the job, would you have a man on the job to keep track of how many hours each man worked? A. Yes.

Q. Did you have one at the Dairy Queen?

A. Well, the Dairy Queen—with regard to the construction we just tell the clerk they worked that day and that is it.

Q. So you took their word for it?

A. Yes; that is right.

Q. And you told the court that on equipment and materials you used the invoice prices?

A. That is right, sir.

Q. No matter when that invoice was dated? [140]



(Testimony of Ernesto O. Diza.)

A. That is right, sir.

Q. Now, for instance, on this hot fudge heater you said it was used at Harmon Field?

A. That is right, sir.

Q. Do you remember how long ago it was bought?           A. Oh, about 1948, sir.

Q. Five years later you used the invoice price?

A. That is right, sir.

Q. Had it been used?

A. After Harmon Field we did not use it any-more.

Q. Was it used at Harmon Field?

A. Yea.

Q. Now, I believe you identified one of those invoices as showing the issuance to Dairy Queen of two gallons imitation vanilla in November or October, 1952?           A. That is right, sir.

Q. Isn't it a fact ten cases of vanilla valued at \$6.50 a gallon were on invoice 14773, dated 11th day of July, 1952, and shipped out here in July of that year?

The Court: I don't see how you can expect him to remember that, Mr. Phelan.

Mr. Phelan: Well, he apparently remembers everything else. I don't see why I can't ask him that if the books show it.

The Court: Well, I think he is trying to the best of his ability to keep everything out except what he knows personally [141] and he would have to rely on his books.

(Testimony of Ernesto O. Diza.)

Q. (By Mr. Phelan): Can you tell that is so from the books?

A. In fact, I don't know that; we have the inventory records; that is the shipping documents.

Q. Do your books show such a shipment of that invoice for the Dairy Queen? A. Yes.

Q. Do you in your ledger or journal show the invoice number of these shipments?

A. Dairy Queen shipment, you mean?

Q. Yes.

A. No; I don't have a file for every shipment.

Q. Do you know that such a shipment was made?

A. Yes; I think so, sir.

Q. Well, why the next month would they be behind in vanilla?

The Court: He wouldn't be expected to know.

Mr. Phelan: Well, I am not too sure he was just a bookkeeper, your Honor. Apparently he was vice president.

The Court: Well, vice president in charge of bookkeeping.

Q. (By Mr. Phelan): Well, now, let me ask you a question. These books up there—this stuff was issued out. Do you show when this material was charged off as being used in the construction of Dairy Queen? Do you show when that was purchased? A. I beg your pardon, sir? [142]

Q. This addition down at the Dairy Queen?

A. Yes.

Q. And some maintenance work down there—

A. Yes.

(Testimony of Ernesto O. Diza.)

Q. You said you charged stuff off at invoice prices regardless when you bought it. Did you keep a record in your books as to when you bought these various items?      A. Well, various invoices, sir.

Q. If you bought something in 1948 and sold it to Dairy Queen in 1953, would your books show that it was something you had from 1948?

A. Since 1948, you mean?

Q. Yes.

A. No; when we opened the Pacific Enterprises all the merchandise is on the books, on the inventory.

Q. Now, tell me this: Certain items depreciate, don't they?      A. That is right, sir.

Q. You maintain a depreciation schedule?

A. That is right, sir.

Q. And you still were selling stuff to Dairy Queen at the original invoice price despite the fact that it was depreciated?

A. Well, that has to be approved by Mr. Thompson and Mr. Siciliano and if they agree with that figure, sir.

Q. Now, did you post these charges to Dairy Queen account?

Mr. Bohn: May I interrupt to ask that be more specific [143] as to which charges you are referring to?

Q. (By Mr. Phelan): Any of these charges pertaining to this suit, this present suit.

A. Well, the vouchers that I turned in to you like the construction materials we bought from PCC

(Testimony of Ernesto O. Diza.)

is charged on Pacific Enterprises books.

Q. They are reflected in Pacific Enterprises books?  
A. That is right, sir.

Q. All right; did you carry them on Dairy Queen books?  
A. No, sir.

Q. Did you carry in Pacific Enterprises books a charge showing that Dairy Queen owed that?

A. Well, I carried it as the building, the Dairy Queen building on my books, sir.

Q. The Dairy Queen building? You had an account for that building?

A. Yes; that is right.

Q. When did you start that account?

A. I started it in July, sir.

Q. July, but you didn't show that in Dairy Queen books?  
A. No, sir.

Q. Did you in Pacific Enterprises books show the partnership or Dairy Queen owed Pacific Enterprises?

A. No; it shows the Dairy Queen building.

Mr. Phelan: I have no other questions. [144]

Mr. Bohn: I have no further questions of this witness.

The Court: Very well. Henry, you may be excused.

Mr. Bohn: Now, your Honor, that concludes the plaintiff's case except I do have a reefer mechanic and electrician here if the court wishes to hear further testimony as regards maintenance.

The Court: Yes; before you conclude I would like to call Mr. Siciliano as the court's own witness.

MR. JOSEPH A. SICILIANO

previously called as a witness by the plaintiff was recalled as a witness by the court and, having been previously sworn, testified as follows:

Examination

By the Court:

Q. Mr. Siciliano, what did you pay for the reefer panels that you charged this company \$50 apiece for?

A. I could give you an exact piece-by-piece price, but I have about \$3,200 tied up in panels.

Q. And that averages what per panel?

A. I would have to figure it out. I have about \$3,200 invested. I have about 500 panels. Some are very old and some are new.

Q. You think they average about \$60 or \$70?

A. No; I think more than that. Some are old ones—probably around \$5,000, I would say around 4 to \$5,000.

Q. So this estimate of \$50 would be a guess?

A. No; that is what I could get for them. I have sold [145] some at that price. They are brand new. The old ones are cheaper, around \$30.

Q. Now, tell me again how did you expect to operate the addition when you had no way of getting from one store to the other?

A. There was no reason to have the same boy. We didn't want to confuse the two places, the ice cream man with a man who was going to handle sandwiches and drinks.

(Testimony of Joseph A. Siciliano.)

Q. Now that is what I want to make clear. You proposed to operate a completely separate business?

A. Not entirely separate, no.

Q. What did it have in common besides the same wall?

A. Well, it wasn't completely separate. It was going to be a milk bar but the same boy that handled the ice cream wasn't going to handle the root beer and so forth. It was not going to be mixed up.

Q. Were you going to keep separate books?

A. Oh, no—as far as the books were concerned that would be separate; it would be separate, yes. It would absolutely have to be separate and the reason for the separation, too, is on account of the medics because of food and that stuff and we wanted to be careful on that end and that is why the building is absolutely separate.

Q. Now, is that good management, not being able to interchange your employees during slack periods? [146]

A. Well, it is all according to the way you look at it. It was the idea that it could operate on its own. Two boys could handle it and I didn't want to mix it with the ice cream because it was a little different operation.

Q. I notice at the Talk of the Town you can go to the bar and have a drink and go in and have your food without having to go out and in another door.

A. Well, your Honor, this is outside, all open to the public. We were interested in the public, not the help.

(Testimony of Joseph A. Siciliano.)

Q. Wouldn't that confuse the public terribly if they didn't know where to go to get certain things?

A. I don't think so. It wouldn't confuse anybody.

Q. If a man wanted a sandwich at one place, he would pay for it and so forth and he would have to go to a completely different window to order his malted milk?

A. That is right; we never intended to run the sandwiches and ice cream at the same window.

Q. In other words, he couldn't go to the same window and get everything he wanted to buy?

A. Absolutely not; it wasn't set up for that reason.

Q. Well, it wasn't just happenstance that there was no connection between the two buildings? I mean, that is the way you planned it?

A. Well, they are connected.

Q. Physically they are completely separated except for two back doors? [147]

A. That is right.

Q. You weren't going to have any air conditioning in common?

A. Oh, yea; I was going to have air conditioning in front.

Q. But not operating off the other plant?

A. No; separate because the one in the other part wouldn't carry both places. I had no intention of that.

The Court: Well, that gives me what I wanted. Do you want to ask any questions?

(Testimony of Joseph A. Siciliano.)

Mr. Phelan: I don't think so at this time. I am rather confused.

The Court: Do you want to clarify any of these points?

Mr. Bohn: No; except just one thing.

### Redirect Examination

By Mr. Bohn:

Q. As I understand the plant of that place down here—I think I understand your earlier testimony to indicate that you had a remote location and that you wanted to build up a bigger operation to get people there. Was that your idea?

A. That is correct, because the location was very poor at that time.

Q. Is it possible that a hot fudge heater would cost \$101?

A. There are certain types that do. The one referred to, I think, came from Honolulu—Johnson Candy Corporation. There are records on that and it is on the books; that is what we must [148] have paid for it.

Q. Assuming that it is an accurate invoice provided on all these items, can you give the court any estimate of their worth or value at the time they were turned over to Dairy Queen?

A. At the time they were turned over you couldn't buy stuff like that on the island and the price paid for it would be a very reasonable price. Either I bought it at Harmon Field through the PX or I had it for a time and it is cheap because



(Testimony of Joseph A. Siciliano.)

if I had to go out and buy it, I would have to pay double or have it sent from the States—for the same piece of equipment.

The Court: That isn't true of reefer panels, is it? You could have put plywood in much more cheaply than \$50, couldn't you?

A. Your Honor, if you would look at what that saves in labor and how easy they are to put in, you can understand why reefer panels are cheaper to put up. They are attached by three bolts and you save labor and material. You have two finished walls and all you have to do is paint it. You have that inside and outside, completely finished. I can build you a house \$1,800 to \$2,000 cheaper with reefer panels. The proof is in my restaurant. It has been up since 1950.

The Court: It would be a pretty good idea to prove——

A. I had to prove this to Governor Skinner at the time of the restaurant and I did. [149]

### Recross-Examination

By Mr. Phelan:

Q. You realize that we were asking you about prices in 1952 and 1953?      A. That is right.

Q. You still contend that it was impossible to buy stuff here on the island at that time in the same manner to the way it was in 1947 and 1948 and 1949?

A. I didn't say it was impossible. I said if I had

(Testimony of Joseph A. Siciliano.)

to pay at that time I would pay that much or more. I know because I have checked reefer parts and I have been buying that stuff for years. In 1947 they were high. In '48 they were high but as we go on they got lower.

Q. We are talking about 1953.

A. Well, I was not here and I couldn't say. I couldn't be very accurate and give you a right answer because I was not here in '53.

Q. Isn't it a fact that the reefer panels are already rusting out in the Talk of the Town at the base?

A. Oh, no; you are wrong. I can prove that to you. I can show you the reefer panels put up in 1950 and I can get any contractor on Guam to prove it hasn't moved or rusted.

Q. I was up there the other day and noticed where it had.

A. Where was that?

Q. Out in front. [150]

A. You were looking at wood, plywood, because they refinished the front. It is 16 inches, galvanized on both sides, glass wool packing, as tight as possible, and as far as I am concerned, the best air conditioned building.

Q. Where does the condensation go?

A. Where does it go?

Q. Yes.

A. At the top they have three little holes. When we get them they are new ones and we took the cork out and that is where it goes.

Q. Were all these panels you had new?

(Testimony of Joseph A. Siciliano.)

A. No; some were new and some were old.

Q. Did you keep a record of what were new and what were old?

A. No; I had stacks of new ones and some old ones. Some can't be used. In other words, we just ripped the galvanized off and it's worth \$15.00 a sheet alone and we saved the wood.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions.

The Court: Very well, thank you.

Mr. Bohn: We have introduced testimony and timecards of the electrician and reefer mechanic. Does your Honor wish me to call them to the stand? Those are the only witnesses we have left. That is maintenance, not a construction matter.

The Court: Well, the testimony, of course, is this work [151] had to be done because this thing had to be rewired and the reefer was broken down, so that's your case and your charge does not appear to be unreasonable assuming that that work had to be done, so I assume that it is up to the defendant to show that it wasn't necessary.

Mr. Bohn: Then that is our case, your Honor.

The Court: Now, let me see—I can suit your convenience. I will probably be through with tomorrow morning's docket before 11:00 o'clock or I can take up again at 1:30 tomorrow afternoon.

Mr. Phelan: Well, if it please the court, I don't recall if I have any motions on tomorrow morning but I would like to have a little time over at the office to dictate some letters.

The Court: There may be motions in connection with one arraignment so we will say 1:30. Now the plaintiff should draw up an order in the joint venture case in accordance with the preliminary order and my instructions this morning and settle with the defendant so that we have a written order to all concerned and get that tomorrow—the order pending the final determination as to how the accounting will be arrived at—one assumes it may be necessary to have an audit; another assumes it will not be necessary to have an accounting.

Mr. Bohn: I understand this is interlocutory?

The Court: This is a temporary order and I am sure everyone understands I want the status quo maintained without the use of any funds except for current operation until the court [152] is able to make final judgment.

Mr. Bohn: I think your order was very clear this morning.

The Court: We will recess until 1:30 tomorrow.

(The court recessed at 5:05 p.m., February 17, 1955.) [153]

Friday, February 18, 1955—2:30 P.M.

The Court: Now, you have rested in Pacific Enterprises, Inc.?

Mr. Bohn: That is right, your Honor.

The Court: The defendant may proceed.

Mr. Bohn: At this time I would like to make a brief motion in connection with a subpoena that was issued.

The Court: Well, I don't know what the defense proposes to do.

Mr. Phelan: I would like to call Mr. Edward Thompson to the stand.

MR. EDWARD THOMPSON

previously called as an adverse witness by the plaintiff, was called as a witness by the defendant and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Phelan:

Q. You are Mr. Edward Thompson?

A. Yes, sir.

Q. Have you been previously sworn in this case?

The Court: Yes; he has been previously sworn in this case.

Q. (By Mr. Phelan): Mr. Thompson, we had testimony yesterday as to the amount of wholesale sales during this period by the Dairy Queen. Have you got the records of Dairy Queen reflecting wholesale sales?

A. Yes, sir; we have invoices and statements prepared by [154] Henry Diza.

Q. Will you tell the court how much they show?

A. I have them over there.

Q. Do they show sales by month?

A. Yes, sir; they do. Here I have a copy of a statement prepared presumably by Henry Diza.

The Court: Now, let's—how long, Mr. Thompson, were you in the wholesale business?

A. We started in August, 1952, in a very small

(Testimony of Edward Thompson.)

way and we are still in the wholesale business in a very small way to Mr. Pedro Ada, Barrigada. We don't use a reefer truck or anything like that because we have insulated packing cases.

The Court: I thought we could possibly get the total figure.

A. The sales for August, 1952, were \$43.72; September, \$137.76; October, \$55.78; November, \$97.28; December, \$52.64. That is to the end of '52, then in '53 we started selling to Pedro Ada and in January of '53 we sold \$72.40 to him and sold \$18.85 to the snack bar. In February, '53, \$59.30 to Mr. Ada and \$75.80 to the snack bar. In March, \$114.95 to Mr. Ada and in April we sold \$93 to Mr. Ada and sold \$203.59 to the snack bar. Since then we have sold to Mr. Ada but not the snack bar.

Q. (By Mr. Phelan): Which snack bar is that, Mr. Thompson?

A. Siciliano's snack bar and we have invoices properly signed by the receiving person. These were not filed. [155]

The Court: That gives us an average of about \$65 a month?

A. I would say a little more than that. About \$101; I figured it up, your Honor.

The Court: Oh, yes.

Q. (By Mr. Phelan): Now, Mr. Thompson, you were here in June of 1952 at the time that the Dairy Queen opened? A. Yes, sir.

Q. Were you familiar with the installation of equipment in that building? A. Yes, sir.

(Testimony of Edward Thompson.)

Q. Were you familiar with the condition of the equipment in that building?

A. At the time it opened, yes, sir.

Q. Did you use new material?

A. We used new material, I think, except for the reefer. I don't think that was new and I think the contractor used some secondhand material in the construction of the building; I am not so sure about that because I don't know for sure.

Q. Now, your electrical equipment was new?

A. The electrical equipment? You mean the motors and all?

Q. Yes.

A. I don't think so. The electrical equipment—the motors on the freezers and the deep freezes, of course, were all new because they came with the equipment but in the air conditioner and in the walk-in refrigerator it's still possible [156] that they used used equipment. I say "they" when I mean the contractor who put it in.

Q. Yes; now, Mr. Thompson, you have heard testimony yesterday on certain items of equipment belonging to Pacific Enterprises that were installed down there, one item being a hot fudge heater. Now, have you got the price of the hot fudge heater that you said you shipped to Guam?

A. Yes; I have and also I have the hot fudge heaters, if Norman will get them. They are right outside.

Q. Will you please get them, Norman?

A. Yesterday afternoon Mr. Siciliano testified

(Testimony of Edward Thompson.)

that the hot fudge heater for which he billed us \$101 was very fine and would have cost us double that at that time. He testified further it was very difficult to get those heaters. We have the heater he put in and we have the heater that I sent out when they ordered hot fudge. When we opened up I didn't think the people on Guam would care for hot fudge in this hot climate, but when I got Henry's order for hot fudge I automatically included the hot fudge heater. The hot fudge heater cost us—Mr. Siciliano's was secondhand and we owed what both he and Mr. Diza said cost \$101. The one we bought cost \$19.78.

The Court: You have got both heaters? I am going to clear that up right now.

A. It is a model 40 made by the Hemeo Company, Chicago, Illinois. That is the price of the two heaters. [157]

The Court: Well, turn the one back to Mr. Siciliano. This involves nothing except heating hot fudge and keeping it hot and ladling it and pumping it out. The \$101 heater, if it is agreeable with the parties, I think, can be returned to Mr. Siciliano. Is that the little one or the big one?

A. That is the little one.

Mr. Bohn: I will accept custody of the heater.

The Court: We will forget about the \$101.

Mr. Bohn: I would like to say that Mr. Siciliano said it might be possible it was a \$101 heater. I am not pressing it; I am accepting the heater.

Q. (By Mr. Phelan): Now, Mr. Thompson, do



(Testimony of Edward Thompson.)

the books of the Dairy Queen reflect the sales by pints and quarts during this 1952 to 1953 period?

A. The books of account never do. That is gotten by analyzing your inventories and supply records. You see books of account are kept in dollars, not in pints and quarts.

Q. So you couldn't turn to these books and say, "during this period we sold so many quarts"?

The Court: Now, the purpose of this line of questioning is to develop the——

Mr. Phelan: The deep freeze and reefer truck.

The Court: Well, the deep freeze was never used, was it?

A. It might have been used when I wasn't here.

The Court: Wasn't the testimony that the deep freeze was [158] put in the warehouse?

A. Put in the unfinished addition; that is where we put it.

The Court: It wasn't used?

A. It might have been hooked up after I left.

The Court: Are you willing to take the deep freeze back?

Mr. Bohn: (Nods head.)

The Court: All right; we will forget about the deep freeze.

Q. (By Mr. Phelan): Mr. Thompson, you testified as to the amount of sales of pints and quarts. Have you got the total figure?

The Court: Now that would relate solely then to the need for the truck?

A. Yes.

(Testimony of Edward Thompson.)

Q. (By Mr. Phelan): You don't have a total figure, do you?

A. I have the figures, yes, but these don't come out of the books of account. The books of account are kept in dollars and cents.

Q. Do you know during the period from June 22, 1952, to August, '53, the total value of wholesale sales?

The Court: He has already given that.

Mr. Phelan: I mean the total.

The Court: The value of what was sold at wholesale of pints and quarts since you didn't use containers, but obviously the sale of over-the-counter pints and quarts can only be measured by consumption of containers? [159]

A. That is right and by our inventory—how many were taken out.

Q. (By Mr. Phelan): Have you got those figures?

A. Yes; we didn't have the inventories for the first few months because Henry Diza had them but I know what the total purchases were and I know we couldn't sell over 3,000 quarts in any one month and one deep freeze will be sufficient. Now with respect to that on January 1, 1953, I wrote Mr. Siciliano a letter reporting on what I found and in that letter I mentioned the fact that they had the holding cabinet. We had the one cabinet. Now it has been testified here that the reefer truck was out there from June 22 until some time in July without exception every day and Joe Meggo testi-

(Testimony of Edward Thompson.)

fied that the larger holding cabinet was there. I write here—this is dated January 1, 1953, and was written that evening—“Joe and he both told me when I saw them last Sunday that we need two more freezers and another deep freeze for quarts and pints yet I have never seen the cabinet as much as half full at any time although every night I told Tony to fill the cabinet every night.” Now this letter was not written to influence this court in any suit we might have; it was written as an honest letter.

The Court: Let me ask you this: You have been doing business without a reefer truck?

A. Yes, sir.

The Court: Have you found any need for [160] one?

A. Absolutely none at any time, your Honor.

The Court: Your gross has fallen off?

A. Yes; but some months after when the gross held up to \$10,000 a month we didn't need the reefer truck.

The Court: In other words, the question of storage is a problem of management?

A. It is, your Honor, and it is easy when you have a leisure moment or two to put in an extra quart to use those that have been sold. It is no trouble to handle 150 quarts a day, which is far more than you sell, out of this deep freeze.

The Court: Of course, there is nothing to prevent you from manufacturing currently?

A. That is exactly what you are supposed to do.

(Testimony of Edward Thompson.)

The Court: Operate with it full and during the day when you get a slack period replace those that have been taken out?

A. It is as simple as that.

Q. (By Mr. Phelan): Mr. Thompson, what was the wholesale price for a quart of ice cream?

A. Around 54 cents, 50 cents, I think. You can roughly double the sales and that would be the number of quarts a month—about 200 quarts wholesale.

The Court: That assumes, I suspect, when you sell wholesale the retailer is selling it for more than you sell it at the Dairy Queen. I notice your price there is 60 cents a quart now. [161]

A. 65 cents a quart and we were selling it for 50 cents; he made 15 cents a quart.

Mr. Phelan: I have no other questions of this witness at this time.

Mr. Bohn: No questions.

Mr. Phelan: Henry Diza. Will you bring with you the ledger and journal log of Pacific Enterprises? May I have those invoices we put in yesterday?

MR. ERNESTO O. DIZA

previously called as a witness by the plaintiff, was called as a witness by the defendant and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Phelan:

Q. Mr. Diza, you have been previously sworn in this case and you are an accountant for Pacific Enterprises? A. That is right, sir.

Q. You maintain the books of the corporation. Now, Mr. Diza, you identified certain of these invoices which were introduced as Plaintiff's No. 3 yesterday. I hand you Exhibit No. 3 and ask you will you show us how you carry them in your books?

A. This particular invoice, it's entered on journal voucher 21.

Q. On what date? A. July, 1952. [162]

Q. On what account? May I see it?

A. July, 1952.

Q. What is the number of that invoice?

A. Voucher No. 21.

Q. What account is that?

A. That is Dairy Queen.

Q. And, am I correct, the explanation is to take up fixtures for restaurant and Dairy Queen to Pedro? A. Yes.

Q. Show me the next one.

The Court: You are dealing now only with the outside purchases?

Mr. Phelan: Yes; they were introduced. These that were introduced yesterday.

(Testimony of Ernesto O. Diza.)

The Court: I wonder if you could satisfy yourself with two or three of them that postings were made without having to go through every one of them?

Mr. Phelan: If the court wouldn't mind maybe we could take a five-minutes recess.

The Court: Those purchases are included in the building, aren't they?

Mr. Thompson: May I speak?

The Court: Yes, well——

Mr. Thompson: It is obvious that it was carried on the books as Pacific Enterprises, as if the building belonged to [163] Pacific Enterprises.

Mr. Bohn: Just a minute—wait—excuse me, if your Honor please, I didn't realize we had a third advocate in this matter.

The Court: Mr. Thompson made his point. Now Mr. Phelan can ask questions as to whether or not the building was carried on the books as a capital asset.

Q. (By Mr. Phelan): Can you tell me how the snack bar down at Anigua is carried on your books?

A. It is carried on, sir.

Q. As what? A. A building.

Q. On your list of assets?

A. That is right.

Q. Of Pacific Enterprises?

A. That is right, sir.

Q. What value does it have?

A. According to the slips, sir.

(Testimony of Ernesto O. Diza.)

Q. Then your value in the books is only according to the value of the materials?

A. That is right, sir.

Q. So as far as you are concerned the building is worth just the cost of the materials that went into it?

A. That is what my records show, sir.

Q. Have you got that tabulated anywhere? [164]

A. Account No. 125(b), No. 124(c).

Q. Would you please read that entry and what is this document?

A. The trial balance, sir, "Account No. 124(c), building, Dairy Queen."

Q. What is the value?           A. \$861.16.

The Court: What is that, Mr. Phelan?

Mr. Phelan: That's his valuation of the building.

The Court: \$861.16?

Mr. Phelan: Would the court care to look at that?

Mr. Bohn: I have some questions on cross-examination that may clear this up as soon as Mr. Phelan gets through.

The Court: I assume that represents outside purchases.

Mr. Phelan: As a matter of fact, there was a \$500 charge in there that didn't belong there and later an adjustment corrected that.

Q. (By Mr. Phelan): What is the exact total of the amount you carry under the account Dairy Queen building?

The Court: Now I am interested whether this

(Testimony of Ernesto O. Diza.)

account is carried as Pacific Enterprises or Dairy Queen building.

Mr. Bohn: Well, would you read to the court the exact entry? What does it say on the books? I am interfering here, Judge, and I shouldn't be doing it but there was another interference. [165]

A. It says here, "Building, Dairy Queen."

Mr. Bohn: Is that all?

A. There is also an explanation here that we bought from Pedro.

Q. (By Mr. Phelan): Read the complete entry. What does it say?

A. "To take up fixtures for restaurant and Dairy Queen, bought from Pedro's."

Q. Will you find us another entry and read us exactly how that is made? Just see what it says in the books.

A. This is journal voucher, 16 July, 1952: "To take up miscellaneous building, Dairy Queen, bought from Marianas Sports Supply Company."

Q. Now, is that the way all of the items are carried? A. That is right, sir.

Q. And is the total of items you have listed that way the amount of outside purchases only?

A. That is correct.

Q. You have listed nothing in that account for materials delivered to Dairy Queen from the Pacific Enterprises, is that correct?

A. That is correct.

Q. You have listed nothing in that account from



(Testimony of Ernesto O. Diza.)

the standpoint of labor for Dairy Queen, is that correct?      A. That is correct. [166]

Mr. Bohn: Isn't it correct what you are doing is outside material paid for?

The Court: That doesn't answer my question as to whether Pacific Enterprises books show the building carried on their books as owned by them.

Mr. Thompson: This is just an entry. It says, "Paid for Dairy Queen."

Mr. Bohn: Mr. Thompson, this is not an audit of the books of Pacific Enterprises and with the court's permission, I would please ask you to let your counsel conduct the examination.

Q. (By Mr. Phelan): Where is the account in the ledger here? Can you point that account out to me?      A. Account No. 124(c).

Q. This is 125(c).

A. Well, that is a clerical error, Mr. Phelan.

Q. Well, what should the account be? First of all, can you find such an account as you show on this trial balance in this book?

A. That is right, this is where I get that trial balance, \$861.16.

Q. Now, have you set up reserve for depreciation on this?      A. No, Mr. Phelan.

Q. You have not. Now, would you show me that in the books?      A. Here it is.

Q. Now, tell me—you have your accounts—this is your [167] journal?

A. This is the general ledger.

(Testimony of Ernesto O. Diza.)

Q. You have your accounts broken down by major headings, have you not?

A. That is right, sir.

Q. And one of those headings is "Buildings"?

A. That is right, sir.

Q. And you have this building down at Anigua as a sub-account under that heading?

A. That is right, sir.

Q. Do these entries show in the Dairy Queen books?      A. No, sir.

Q. Do those books there reflect the Talk of the Town?      A. Yes, sir.

Q. Do they reflect the Pacific Bakery?

A. Pacific Bakery, snack bar and Talk of the Town.

Q. Those are the books of Pacific Enterprises?

A. That is right, sir.

Q. Do you have your depreciation account in those books on equipment?      A. Yes, sir.

Q. Mr. Diza, one of the items listed here was a  $\frac{3}{4}$  h.p. motor, Westinghouse. Can you find that in your depreciation?

A. Well, I am supposed to have a complete list of equipment, sir. I cannot find it here. This is just figures here. [168]

Q. You don't have it itemized?      A. No.

Mr. Phelan: I have no further questions at this time.

(Testimony of Ernesto O. Diza.)

Cross-Examination

By Mr. Bohn:

Q. I have just one or two. Now, Henry, you spent of Pacific Enterprises money whatever it took to pay off these vouchers, is that correct?

A. That is right.

Q. And you listed that total amount as one of the assets of Pacific Enterprises, is that correct?

A. Well, I don't say it's assets for Pacific Enterprises but it shows in my books, "Building, Dairy Queen," whatever you want to call it.

Q. Let me put this another way: You paid these invoices, is that correct?

A. That is correct.

Q. The material went in the Dairy Queen building, is that correct?      A. Yes, sir.

Q. And you identified that in your books as "Dairy Queen Building," is that correct?

A. That is right, sir.

Q. And you actually expended the cash of Pacific Enterprises to pay this? [169]

A. That is right, sir.

Q. Just this paid out, is that correct?

A. Yes, sir.

Mr. Bohn: I have no further questions.

The Court: You may step down, Henry.

Mr. Phelan: May it please the court, I am going to call Mr. Thompson to ask him what is in these books.

Mr. Bohn: Just a minute. I am going to object.

You asked Mr. Thompson a few questions and I see no reason why he should answer questions on Pacific Enterprises books except as pertains to the Dairy Queen of Guam.

The Court: The objection will be overruled.

MR. EDWARD THOMPSON

previously called as a witness by the plaintiff and by the defendant was recalled by the defendant and, having been previously sworn, testified as follows:

Direct Examination

(Continued)

By Mr. Phelan:

Q. Mr. Thompson, you are a certified public accountant? A. Yes, sir.

Q. Will you look at these invoices which are Plaintiff's Exhibit No. 3? How are they reflected in the books and how is the building——

Mr. Bohn: I object to that on the grounds the answer will come out as a technical conclusion to which I will object. [170]

The Court: Well, we can find out.

A. I have to borrow Henry's statement of accounts. These accounts are not listed.

Mr. Bohn: You are asking that this letter be used?

Mr. Phelan: Yes.

Mr. Bohn: Will you identify it then?

Mr. Phelan: It is the index of the accounts.

A. Is that No. 124 (c), the Dairy Queen?

Mr. Bohn: Let me see that.

(Testimony of Edward Thompson.)

Mr. Phelan: 125 (c), Mr. Thompson. It says 124 (c) there.

A. Yes, 125 (c), that is right. These accounts are kept as most business houses do—cash and buildings are grouped together. All of the building accounts are grouped in one together—snack bar, Talk of the Town and the building at Dairy Queen property, booked as buildings owned by Pacific Enterprises. It is not included under accounts receivable. They have not charged to it the materials that they furnished themselves.

The Court: I think that is perfectly clear and admitted. In other words, what they did—Mr. Siciliano before he left put up a building. They purchased materials as they needed materials and they charged them to Pacific Enterprises, Inc., and forgot about it and didn't do anything about carrying it on the accounts of Dairy Queen or carrying on any proper practices. The fact is we have got the building and it is up and somewhere along the line we have got to figure what to do about it. I don't think [171] there is any doubt about the way accounts were kept or weren't kept. It might have been their intention never to charge that to Dairy Queen but to operate it as a separate and distinct business for the benefit of Pacific Enterprises. It could have been their intention but, Mr. Thompson, you would cast a very critical eye when you came out and saw a building in some respects a competing business?

A. Yes, I would have in a year later, yes.

(Testimony of Edward Thompson.)

The Court: I am more concerned with the fact that we have a building. I am also concerned with the fact that American Pacific Dairy Products said they had nothing to do with the building; it isn't their building, but they permitted Norman to go in and alter and make a home out of it without any agreement from Siciliano.

A. He took the same chance as Siciliano did. I told Norman that at the time.

The Court: But as president of American Pacific Dairy Products you had no right to tell Norman to occupy property in which you denied any interest.

A. I did deny interest.

The Court: You are currently paying for the power he uses?

A. Yes, he does use some power.

The Court: Air conditioning and so forth—it is all on your bill?

A. All on the bill. I never thought of it, [172] yes.

Q. (By Mr. Phelan): Will you look at this and tell me what account that is?

A. This wouldn't be in there.

Mr. Bohn: I do not believe—I was about to stipulate that such an account is not in the books but I want to find out. I think it is correct. I think such an account is not in the books. I think Henry testified to that yesterday. He kept them on those slips and it is not in the books.

The Court: I think we have to admit that Pa-

(Testimony of Edward Thompson.)

cific Enterprises did not carry an account for the Dairy Queen. It carried no account; no place to enter it.

Mr. Bohn: Except this one item which says "Dairy Queen" and that reflects the outside payments.

The Court: It wasn't the account of Dairy Queen. It was an account of Pacific Enterprises. Now the original testimony indicates that there were certain items that were set up on the books. Now is that limited to these payments for materials?

Mr. Bohn: Limited to these outside payments, that is correct.

Mr. Phelan: The only things which were showed in Pacific Enterprises was money they sent to third parties.

A. Yes, only for payments to third parties.

Q. (By Mr. Phelan): Now I want to ask one other question: Is there any account where Dairy Queen is shown in those books at all? [173]

Mr. Bohn: I am informed that there is an account designated to pay purchases bought for Dairy Queen.

A. And it is the \$1,066 that was agreed between the parties.

Mr. Bohn: The only account is one in reverse to pay them. They bought ice cream and that sort of thing and there is no question about that. It has all been paid.

A. No, it hasn't been paid. It is on that state-

(Testimony of Edward Thompson.)

ment and it is deducted. That is how we know we agree.

Q. (By Mr. Phelan): Now is it possible—may I ask this question: Is it possible to tell from the books and records of Pacific Enterprises the amounts of supplies issued to Dairy Queen during that period? A. Dairy Queen supplies?

Q. That were issued from the storehouse?

A. No, that was all kept on Dairy Queen books.

Q. Is it possible to tell from the Dairy Queen books the quantities issued?

A. Yes, that is entered every week—every month.

Q. Can you tell from an inspection of the books, Mr. Thompson, the quantities of frozen strawberries issued from the Dairy Queen books?

A. No, that is kept on inventory cards. The books are only in dollars and cents—everybody at least who uses United States currency, and you don't keep quarts, tons or gallons. That is what we call subsidiary records—in the nature of statistical [174] records rather than operating records.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have none.

The Court: Thank you, Mr. Thompson. Call your next witness.

Mr. Phelan: Norman Thompson.



MR. NORMAN THOMPSON

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Will you please identify yourself for the record?

A. I am Norman Thompson, P.O. Box 725, Agana, Guam, manager, Dairy Queen.

Q. Mr. Thompson, can you tell me if when you were here on Guam you used that reefer truck?

A. I didn't, no, I didn't.

Q. Was the reefer truck down at the Dairy Queen when you came to Guam?

A. Yes, it was plugged in and running.

Q. Was it being used?

A. At times because it was there.

Q. Did you ever use it to haul any materials, any ice cream being sold?      A. Yes. [175]

Q. Do you know how many wholesale outlets you had? How many places did you sell wholesale?

A. Well, the day I arrived we had the Pacific Bakery snack bar but I think that was discontinued at the end of April, and we had the Barrigada store of Pedro Ada, the Long Barn store. The Long Barn store we still continue to serve, and we had the Agana store of Pedro Ada in the main part of town.

Q. They were the only wholesale outlets?

A. Yes.

(Testimony of Norman Thompson.)

Q. Now with respect to the deep freeze in the store—how many quarts would you keep in that? How full would it be?

A. The old style we could handle over 100 quarts—six across—118 quarts in a section and then we had another section for pints and we had room for 90 pints and 118 quarts capacity.

Q. That would normally take care of your business at the store?           A. Yes, sir.

Q. One deep freeze handled all?

A. That's how many we had when I came here. I wrote Dad that we had Mr. Siciliano's deep freeze here and he sent another one over.

The Court: Let me ask you this, Norman: If I went to get a quart of ice cream could you get it from the deep freeze or could you just take a quart container and take it out of the [176] machine?

A. I could do either you wanted. Some people from Umatic, say, would want hard ice cream and if I take a jiffy bag the ice cream would hold up a half hour or 45 minutes in the jiffy bag, then it starts melting.

The Court: I mean for immediate service.

A. Either one depending on the way you wanted it. Some people come to the window and say "Give me a quart out of the freezer," because they are going home to dinner and will eat it when they get home.

Q. (By Mr. Phelan): Mr. Thompson, there is a list of equipment supposed to be down there— $\frac{3}{4}$

(Testimony of Norman Thompson.)

h.p. motor, Westinghouse, Universal condenser—are you familiar with that list?

A. I am familiar with that list.

Q. Was that equipment there when you took over?

A. No, it wasn't there when I took over and I still haven't come across the Westinghouse motor.

Q. How about the Universal condenser?

A. I imagine that is above the door.

The Court: Let's get that straight. Isn't the  $\frac{3}{4}$  h.p. motor the one that was put in the walk-in?

A. I checked all the motors and I couldn't find that  $\frac{3}{4}$  Westinghouse in the place. I have got a 2 h.p. Westinghouse motor; the other ones are Wagners. I have two Wagner electrical AGE motors and a 2 h.p. Westinghouse at the present time but I [177] haven't seen a  $\frac{3}{4}$  Westinghouse motor.

Mr. Bohn: I believe that was one that was purchased outside and we have a voucher on it.

A. It was but was it ever delivered?

The Court: The testimony was that it was put in the walk-in and the old motor taken out and Pacific Enterprises had the old motor that was completely burned out.

Q. (By Mr. Phelan): The next item after that Universal condenser is a blower.

A. There are two of them, isn't that correct?

Q. Two.

A. They are connected to the air conditioning that Pacific Enterprises put in. The condenser and the two blowers are what I believe they consider

(Testimony of Norman Thompson.)

the air conditioning unit above the door that we have in the store.

Q. Carrier compressor?

A. No, I don't think there is a carrier compressor. Carrier compressors are designed differently but I am pretty sure—it doesn't say the size compressor does it?

Q. No. A. I couldn't tell you.

Q. How about the two electric fans?

A. When I came there there were two electric fans in the salesroom. One wasn't working; one was working.

Mr. Bohn: I believe it was agreed we would take those back. [178]

Mr. Phelan: Cross it off then.

The Court: What do you want to do with the fans? Give them back?

Mr. Bohn: We will go either way, your Honor.

The Court: Well, you have two fans coming to you then and a deep freeze.

Mr. Bohn: We have assumed possession of the other item which is being returned to us.

The Court: You have assumed possession? Oh, you mean of the hot fudge heater.

Mr. Phelan: I have no other questions.

Mr. Bohn: Only one.

The Court: Ask Mr. Thompson about the evaporator. I have a pretty good idea as to what it is but he probably knows definitely. We asked the foreman what a particular item was.

Mr. Bohn: Slimline.

(Testimony of Norman Thompson.)

The Court: No, that's in connection—that is obviously electrical equipment.

Mr. Bohn: That is an air cooler evaporator.

The Court: That was an air cooler evaporator. Now I assume you have some device in connection with air conditioning equipment whereby when you take air in front from the outside it takes the moisture out of it, is that correct?

A. Absolutely correct.

The Court: And is that there? [179]

A. Yes, your Honor. I made a mistake. That was on the other item of \$25.

#### Cross-Examination

By Mr. Bohn:

Q. Universal condenser?

A. Well, that is a unit that looks like a radiator. The air cooler evaporator takes the hot air when it goes through the tubing with freezon going through and it chills the air.

The Court: You need that, don't you?

A. Oh, to make the air conditioner work you need it.

The Court: It says down here \$150. Is that about right?

A. For that size unit that is about right. That is the evaporator.

Q. (By Mr. Bohn): I have one question to ask Mr. Norman Thompson. You said about the carrier compressor you didn't know what that is. To try

(Testimony of Norman Thompson.)

to refresh your memory—it says “carrier compressor installed to walk-in reefer.” Does that help your memory?

A. No, just the other day the reefer man who built the store was down there. I was complaining about the other store being short of gas in the walk-in equipment in the other store and he came down and he said when he put it in they said it wasn't big enough. It was painted the same color as the rest of the equipment, red, and it doesn't belong to Pacific Bakery.

Q. Was that there when you came? It was already there? [180]

A. It was there when the store was built.

Mr. Phelan: This air conditioning equipment is equipment, though, that would be installed to start with anyway?

A. Not the equipment that is there. We had air conditioning in there.

Mr. Phelan: It is not the equipment that would do this?

A. Yes, it was doing a better job when I arrived and this was not installed properly. This one I have now is properly made for a 5 h.p. motor. That much more freezon has to be present or the compressor must have a larger motor, but that is the maximum according to the government of Guam.

The Court: Am I correct—the freezon under pressure is what does the freezing?

A. Not under pressure. It turns from liquid to gas but you have to get it back in the liquid form

(Testimony of Norman Thompson.)

from gas and when I arrived they tried to bring compressor through the air evaporator which is eight or ten inches thick and cool it by the front one. It wouldn't work.

Mr. Bohn: I have no further questions.

Mr. Phelan: I have no other questions.

Examination by the Court

Q. About how much business are you doing down at the Dairy Queen?

A. Yesterday we didn't do so well but it averages out to [181] \$140 to \$150 a day. I think Friday to Sunday—Friday night we get the start of it and by Saturday and Sunday we are—provided no thunder showers—we are doing about \$230. Week the warm air from the back room, that is from the ends are the biggest days.

Q. You are doing two-thirds of what you did in June, '53?      A. June—what did we do?

Q. Roughly \$10,000.      A. That is correct.

Mr. Phelan: I am going to rest, if it please the Court. The order of proof is rather weird but I think we have proved every point.

The Court: You have no counterclaim?

Mr. Phelan: We have a counterclaim in here. I think we have shown—

The Court: Let me get that out of the way. What did you show in the way of a counterclaim?

Mr. Phelan: Let me get the counterclaim. We have shown the installed property. We have shown

that certain property installed there was removed. We have shown that certain of the supplies were removed and used plywood——

The Court: I don't——

Mr. Phelan: I believe Mr. Meggo testified to the effect that those 12 sheets of plywood that were already there were taken out.

The Court: That goes in the building. [182]

Mr. Phelan: In the building but I don't think the same thing should show twice.

The Court: Well, I think we have to treat that building pretty much as a give-and-take thing.

Mr. Phelan: I have not succeeded in showing cause. I thought these books would show that more supplies came in than were issued out and accounted for; that some were diverted, but we have definitely shown—we haven't shown the value but we have shown that some acoustic tile was used.

The Court: You have shown what?

Mr. Phelan: Their own foreman stated that they used some acoustic tile in there.

The Court: Yes, he didn't know how many square feet.

Mr. Phelan: That is of some value too. Now we have not only the counterclaim but we also have a cross-complaint against Mr. Siciliano.

The Court: Well, anything we have to take away from one side we have to put in the building; it wasn't charged to you.

Mr. Phelan: If the Court please, if you don't make allowances for it you can in effect show the same figure twice. That is what I am thinking of.



The Court: Yes.

Mr. Phelan: I think that this testimony has substantially shown Mr. Siciliano's obligation to the partnership.

The Court: Are you all through? [183]

Mr. Phelan: We have no further testimony.

The Court: I have an unusual request to make of counsel. Before summing up in connection with this case I would like to have counsels' permission to talk to Mr. Thompson and Mr. Siciliano in chambers.

Mr. Phelan: I have no objection.

Mr. Bohn: We would gladly consent.

The Court: I, at least, before going further in this thing, would like to satisfy myself on a few points in the common interest. Do you mind?

Mr. Thompson: I do not.

The Court: Let's recess for half hour and Mr. Thompson and Mr. Siciliano come in.

(The Court recessed at 2:40 p.m., February 18, 1955, and reconvened at 4:20 p.m., February 18, 1955.)

The Court: I just want counsel to know that I thought it would be of benefit to all concerned if I talked to Mr. Siciliano and Mr. Thompson. I have done so and I am rather encouraged in the view that they are fundamentally interested in continuing on a sounder basis an operation which may be to their mutual advantage, and I think, therefore, as Mr. Thompson is contacting his board of directors and so forth and incidental to my talk, in the Sicil-

iano vs. The American Pacific Dairy Products case that I will do nothing in connection with that case in the formulation of an opinion for a period of 30 days to [184] give the parties an opportunity to develop their plans and see if anything comes of it. Now is that satisfactory, counsel?

Mr. Bohn: I would like to make a statement to the Court for the record that, speaking on behalf of the plaintiff, we appreciate very much the personal interest and time your Honor has taken in this matter and these conferences and the result is completely satisfactory as far as the plaintiff is concerned.

The Court: I am rather impressed with the thought that probably Mr. Thompson and Mr. Siciliano know more about what they are doing than we do.

Br. Bohn: I agree.

Mr. Phelan: I think that is obvious. The other case is just suspended for 30 days?

The Court: Yes.

Mr. Phelan: It would seem to me, your Honor, that either the capital account is \$4,000 too high or \$8,000 too high. That is my question.

The Court: No, Mr. Thompson tells me that as of May 31 if the \$8,000 had not been paid back and was still owed by the partnership, the profit would have been \$39,000.

Mr. Thompson: I suggest let the books speak for themselves.

The Court: Now let's get to this case.

Mr. Bohn: Your Honor, if I might interrupt you just a moment. I have prepared that interlocutory judgment that you wished me to prepare and I have showed it to Mr. Phelan and he [185] has agreed that it is accurate and proper.

The Court: Now let's have the items that you agreed upon.

Mr. Bohn: I kept rather complete notes on this, your Honor. Shall I undertake to——

The Court: Let's take up the subsistence and housing.

Mr. Bohn: The subsistence according to my notes totals \$2,996.15. That represents two accounts: \$975.85 and the figure on the next page of \$2,020.30.

The Court: That is accepted as being correct and housing at \$465.30.

Mr. Phelan: Will you give me the first total?

The Court: The first total is \$2,996.15. Now the use of the reefer truck.

Mr. Phelan: We didn't agree on that.

The Court: You did not agree on it and I don't. I think your figures are high. The reefer was of some advantage but I find no advantage to Dairy Queen insofar as disadvantage to Pacific Enterprises is concerned because your testimony shows that while it may have been used for storage, that its primary purpose was to have it available for reefer purposes for Pacific Enterprises. It had to be kept cold and had to be kept up at all times for that purpose. Now it was used for transportation and so forth, so I think we are going to cut down

the reefer from \$1,012.50 to \$400. Not as to storage of supplies—admitted. Oh, yes, we have [186] deliveries.

Mr. Bohn: You have two delivery items.

The Court: Yes, I don't see anything that seems to me to be unreasonable.

Mr. Thompson: I think I said so.

The Court: He wanted proof. That gives us a total for hauling supplies of \$292.50.

Mr. Bohn: For storage we have an agreed figure of \$315.

The Court: Storage, \$315. Is that correct, Mr. Phelan?

Mr. Phelan: Yes.

Mr. Bohn: The next item, for freezing, we have an agreed figure of \$75.

The Court: Now this maintenance—that is an item I don't know anything. If you check your books it would help out here.

Mr. Phelan: That should be separated into two figures. One is garbage and the other is maintenance, and there is an agreed figure on the garbage.

The Court: The garbage was cut in half.

Mr. Bohn: Yes, \$126.50, your Honor.

The Court: \$126.50. As I have indicated, in connection with work which was done by Pacific Enterprises boys, I think that there is a strict accounting required, and I am not satisfied that the method that the time was kept satisfies the requirements of the law. Now undoubtedly these services in part, at least, were performed and we are roughly agreed

as to the reasonableness of the charge. Certainly the charge in this case was much less [187] than you could have employed someone outside. Now on the electrician and reefer mechanics I am going to allow 60 per cent of the amount claimed, that is \$75.74, \$4.33 and \$283.00.

Mr. Phelan: \$217.84.

The Court: \$217.84.

Mr. Phelan: I think that's the figure.

The Court: Remember we agreed on that.

Mr. Bohn: I didn't compute it but everybody here is a better mathematician than I am. We will accept that figure as being an accurate calculation—\$217.84.

The Court: And under that item we have \$126.50 plus \$217.84. It gives me \$344.34.

Mr. Phelan: That is right.

The Court: Now that takes care of Item IX.

Mr. Phelan: Yes.

Mr. Bohn: As to No. X we have an agreement on some items and as to others—

The Court: Yes, I will take a look at No. X.

Mr. Bohn: X is the supplies. We had an agreement to the extent of \$27.16.

The Court: You want to make these notes: \$2.86 I will not allow because it seems to be questioned and that is the imitation vanilla flavoring. The mulch paper was never explained.

Mr. Phelan: That is hand towels.

The Court: You talk about 16 x 36. That is a pretty [188] good-sized paper towel, but anyhow your evidence didn't support that. The item of \$6.00

for straws was questioned and in view of a common use in the absence of setting those up on your books as a charge at the time that they were delivered, we will disallow it, which gives us as allowed under item X \$3.00, \$3.00, \$1.96, \$3.50, \$11.47—granulated sugar is also disputed and may have been paid back out of sugar when it was received. There was some evidence that they borrowed back and forth. Since that was not a charge set up on the books, I think it should be disallowed. \$11.47, \$2.00, \$2.23. Now what is that?

Mr. Bohn: That, I think, is the exact list of agreed items which, if I am correct, totals \$27.16, your Honor.

The Court: That is for supplies. Now XI is other expenses. I think those should be allowed. If the paint was not used there it should have been questioned and since certainly it is known on Guam it is not uncommon to get crushed coral for a concrete parking area, so that is allowed in full. \$23.45 plus \$.66 gives us what? \$24.11.

Mr. Bohn: \$24.11 is what I have, your Honor.

The Court: Equipment owned by Pacific Enterprises, Inc., No. XII—well, you are not too far off on this. The  $\frac{3}{4}$  h.p. motor I think there could be—subsequent to its installation—there could be some error on that. I think it ought to be clear if there is a Westinghouse motor in the walk-in.

Mr. Bohn: I understood that there was some testimony— [189]

The Court: I think Norman testified it was a

2 h.p. You have the voucher. I think the probability is that you have something and I am going to allow that. I think it must be there. The condenser is unquestioned, isn't it? The blower—where do we come out on that?

Mr. Norman Thompson: We have them, your Honor.

Mr. Phelan: However, if it please the Court—these items—the testimony of Pacific Enterprises—

Mr. Norman Thompson: The blower constitutes the air conditioner and they took ours and the same for the air cooled evaporator and  $\frac{3}{4}$  h.p. motor, whatever it may be. They have our equipment which they replaced.

The Court: Is the air cooler evaporator used?

Mr. Norman Thompson: I don't know. They replaced ours with theirs.

The Court: Now let's see what we have here. Your electric fans.

Mr. Bohn: We will pick those up.

The Court: The deep freeze?

Mr. Bohn: We will pick that up also.

The Court: The statement was there wasn't a carrier compressor in there. Now what about the compressor?

Mr. Thompson: We have the same one that was in there originally. It was painted by the man who put it in and it is still in there. [190]

The Court: These items I am going to allow: \$70 for the motor since it was testified it was put in new and the other was burned out. On the others

I am going to allow 50 per cent upon the assumption that they may have been used. You have no vouchers to show any new purchases on those so I am going to allow you credit, roughly the cost of repairing old equipment, which will give you an allowance on that item of \$185.30, is that correct?

Mr. Bohn: Those items, Judge, are \$25.00, \$45.60, \$150.00, and are you allowing the last item of \$50.00?

The Court: Well, they can't find it there.

Mr. Bohn: Well, our man testified that it was there but I have no personal knowledge of it.

The Court: Well, Norman says it isn't there—maybe something else but I can't take his word that it was put in there at the same time Norman would know whether or not it is there now, so I am disallowing that. If you find out you are mistaken, you can make an adjustment.

Mr. Bohn: The items then we are getting 50 per cent allowance on are \$25.00, \$45.60 and \$150, is that correct?

The Court: Yes.

Mr. Bohn: I find that totals \$220.60, which gives us \$110.30.

The Court: It gives you \$115.30 plus \$70.

Mr. Bohn: Mine came out \$220.60 and—— [191]

The Court: You have three items, \$25.00, \$45.60, \$150, and half——

Mr. Bohn: That is correct. I make a total of half which would be \$110.30 and added to the \$70 would make \$180.30.

The Court: Agreed.



Mr. Phelan: I will agree on that. Now may we have the original blower and air cooler back if that was taken out?

Mr. Bohn: Whatever we have you can have. If it was junk you can have it.

The Court: I am just trying to get together now on mathematics. If that is settled that \$180.30 is correct that will finish that up. Now what do you have in here that is equipment? What do we have left?

Mr. Bohn: I beg your pardon?

The Court: What do you have left except the buildings?

Mr. Bohn: We have "Other Salaries," one item. Other salaries has been agreed upon—\$90.97.

The Court: Oh, yes.

Mr. Bohn: Other salaries we offered no specific proof in this case.

The Court: Well, on those, of course, it was of value but, as I pointed out, you didn't set up charges and there isn't any showing that it meant additional expenditures by Pacific Enterprises, and Pacific Enterprises was never a party to any personnel service contract. They were not charged on your books. [192] Consequently I just have to assume that they were a gratuitous contribution by Mr. Siciliano during this hiatus period when he wasn't sure whether he was coming back or not. Up to this point, Mr. Phelan, do you have any offsets as to those items?

Mr. Bohn: There is one offset, your Honor, admitted in the account Pacific Enterprises owed the

Dairy Queen—an item of \$1,066.28, admitted by all parties. That comes off the allowance made to us. We admitted it in the accounting. We made an automatic deduction in the accounting.

The Court: Oh, yes, that comes off your \$13,000 figure.

Mr. Bohn: That is correct.

The Court: Now are we down to the building?

Mr. Bohn: Yes, sir.

Mr. Phelan: There is one item there, a supplemental item down at the end—these passport fees and employees' clearances.

Mr. Bohn: Those were all considered to be paid by Dairy Queen.

The Court: Which items are those?

Mr. Phelan: Transportation and——

Mr. Thompson: Transportation and clearances, your Honor.

Mr. Phelan: Down at the end. It is broken down. I can't even pronounce this name.

The Court: Where is it?

Mr. Phelan: It's the last item in the supplemental charges on the breakdown. Those supplemental charges included [193] that item for subsistence, \$975.85.

The Court: I haven't got it included, have I?

Mr. Phelan: You have those two included.

Mr. Bohn: That was not admitted. As a matter of fact we didn't introduce any evidence on the differential pay and employees' clearances and those were expenditures by Pacific Enterprises. We didn't

introduce any evidence on it. I will accept any offer Mr. Thompson now makes on it.

Mr. Thompson: We had a letter signed by Mr. Lyle Turner, secretary-treasurer, saying we wouldn't be charged. All we were to pay was subsistence and housing. Now just above that is a salary adjustment we accept.

Mr. Bohn: Then that \$90 can be added to the list, if your Honor please.

The Court: \$90 for what?

Mr. Bohn: Differential pay and Mr. Thompson has just said he is willing to pay that.

The Court: The differential pay is \$90?

Mr. Bohn: That is correct, your Honor.

The Court: Now are we all through except for the building?

Mr. Phelan: I can't remember anything we haven't covered.

The Court: Well, now in connection with the building, the evidence was somewhat in dispute. As a building for sale and knowing something about our construction difficulties in Guam, I could not quarrel with the assumption that 500 square [194] of space for \$2,300 in a building is reasonable, nor from a strictly legal standpoint could I quarrel with the concept that if Pacific Enterprises, Inc., had been employed by the manager of Dairy Queen on a quantum meruit basis, that the Dairy Queen would be liable to Pacific Enterprises, Inc., for the reasonable cost of construction, but in connection with both cases and in fairness to all of the parties here, I do not think that the partnership ever

reached a meeting of the minds as to the construction of that building and its use. It may be that—and I think it's quite possible—there may be some future use, increased office needs or something of that kind if these parties get together as I hope, and the building will become increasingly valuable, in which event they will get the benefit. But if I allowed the full claim, which I do not consider unreasonable, I would have to hold that it should not have been constructed without further consultation between the partners and any differential would have to come out of profits to which Mr. Siciliano would be entitled, which is beating the devil about the bush so far as this is concerned. Now I think in fairness, gentlemen, that you do have an existing value there of something like \$1,500 exclusive of the septic tank. I think that existing value should be paid after Norman has gotten credit, a reasonable credit, for his labor and his expenditures in converting it to living quarters. It should have a rental value and when Norman occupies it he should be paying a reasonable rental for it, and even if [195] we assume \$40 or \$50 a month on amortization of the \$1,500 cost, the building would pay itself out in a few years and also leave us an additional facility there which can be converted to further use at any time. Now there I am just assuming that this thing moved too rapidly; that if Mr. Siciliano had been here it is highly possible that we would have had some operation down there that would have been of mutual benefit and profitable to both parties, but what we have, because of his absence, because of a

mix-up on the glass and so forth, is a skeleton so to speak just sitting there. Now I am going to allow to Pacific Enterprises, Inc., since Mr. Siciliano is almost the sole owner of that corporation, \$2,300 for that building and cesspool with, of course, the understanding that no deductions may then be taken in connection with any partnership claim.

Mr. Phelan: I don't follow that no deduction.

The Court: What I tried to say, Mr. Phelan, was that if I allowed the full value to Pacific Enterprises, Inc., of \$2,300, in good conscience I would think that \$1,000 of that would have to be taken from Mr. Siciliano's share of the profits. I am taking it off now since Mr. Siciliano has to pay this \$1,000 as another loss for not being available to carry out his ideas, is that right?

Mr. Phelan: Yes.

The Court: Let's figure up what we have got.

Mr. Bohn: We come to a quick total of [196] \$6,535.55.

The Court: I have more than that.

Mr. Bohn: I haven't had a chance to check it.

Mr. Phelan: I think it would be faster if we run out to the clerk's office and run a tape on this.

The Court: Yes, do that.

Mr. Bohn: Might I read the adding machine tape against your figures? We have \$7,600.83. Our total shows, if your Honor please, \$7,600.83.

The Court: And off that comes \$1,066.28.

Mr. Phelan: Leaving a net of \$6,534.55.

The Court: \$6,534.55. Very well, the Court finds in this case that as a result of the accounting which

appears in the record, judgment should be given for the plaintiff and against the defendant in the amount of \$6,534.55. The plaintiff will prepare a judgment in that amount and execution under that judgment will be stayed for 30 days.

Mr. Bohn: May I ask one question? As to the \$2,300 figure—that is not to be deducted from Siciliano's share after ultimate accounting, is that correct?

The Court: The \$2,300 figure comes out of profits. In other words, when you have your accounting of the partnership you take out the amount of this judgment except for the cost of subsistence and housing of employees subsequent to the date at which time the Court determined that the partnership was terminated. Which means, in effect, of course, that half of it comes [197] out; now whether it is added to the capital account, I don't know.

Mr. Bohn: Well, that was my thought. It should be added to the capital account.

The Court: My guess is that it's added to the capital account because the entire amount would be paid back to one partner. Instead of trying to do it on that basis and then taking something off Siciliano's and so forth, I am trying to get it straightened out here, so in view of your agreement that judgment will be accepted, you can simply file a judgment in that amount and for the reason I gave you earlier, I think the execution should be stayed until these parties have a chance to get together.

Mr. Phelan: I think it will have to be stayed until we straighten out the books. In connection

with the current books, your Honor, when can Mr. Thompson get ahold of those so he can bring them up?

The Court: If the parties are agreeable I have no objection to permitting them to withdraw the current books. Now that is the ledger subsequent to——

Mr. Phelan: He needs those for current work.

The Court: From July 1st.

Mr. Bohn: We have no objection.

Mr. Phelan: So he can post to it currently.

The Court: Well, these are the books he set up after July 1st? [198]

Mr. Phelan: Yes.

Mr. Bohn: No objection.

The Court: The Court will permit them to be withdrawn and they are under the order here that all books are to be available for inspection whenever they are required.

Mr. Bohn: As I understand the situation, these are turned over to Norman Thompson as trustee of the Court?

The Court: That is right. Norman, you can take along your current books as trustee of the Court for the assets of Dairy Queen. They are put in your custody and are to be available for inspection by an accountant if necessary. Now I take it you have no objection to serving in this capacity, Norman?

Mr. Norman Thompson: No, your Honor, I do not.

The Court: Very well. There being no further

business to come before the Court, the Court will stand adjourned.

(The Court adjourned at 5:10 p.m., February 18, 1955.)

District Court of Guam,  
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place set forth.

/s/ DOROTHY L. WILKINS,  
Official Court Reporter.

[Endorsed]: Filed June 20, 1955. [199]

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[Title of District Court and Cause.]

#### DOCKET ENTRIES

11-4-54:

1. Filed Complaint.

Issued summons and 2 copies and 2 copies of Complaint to U. S. Marshal.

11-8-54:

2. Filed summons endorsed served 11-5.

11-26-54:

3. Filed Sp. appr. and Motion to Dismiss—  
American Pacific Dairy.

4. Filed Motion for Change of Venue, etc.



5. Filed Motion for more Definite Statement and Motion to Strike.

6. Filed Notice of Motion. Hearing set for December 10.

12-10-54:

Hearing: Attorneys present. Arguments had. Court denies all motions before court and gives defendant 20 days in which to file its answer.

12-29-54:

7. Filed defendant—American Pacific Dairy Products—Answer and Cross-Complaint.

Issued summons and 1 copy and 1 copy of Answer and Cross-Complaint to U. S. Marshal.

8. Filed Affidavit of Service of Answer and Cross-Complaint.

9. Filed copy of Summons w/return endorsed thereon by U. S. Marshal.

1-19-55:

10. Filed plaintiff's Reply to Counterclaim.

11. Filed Defendant, Siciliano's Answer to Cross-Claim.

1-21-55:

Fwth. Hearing: Attorneys present. Ordered Pretrial Conference set for January 26.

1-26-55:

Pretrial Conference: Attorneys present. Case consolidated with Civil 59-54 and set for trial February 14. Pretrial order to be filed.

12. Filed Pretrial Order.

1-27-55:

13. Filed copy of clerk's letter advising attorneys re filing of Pretrial Order and trial date.

2-2-55:

14. Filed Request for Admission of Facts.

2-9-55:

15. Filed Motion for continuance.

16. Filed motion for severance.

17. Filed demand for Jury Trial.

18. Filed Affidavit of Edward Thompson.

19. Filed Affidavit of Norman Thompson.

20. Filed Affidavit of Finton J. Phelan, Jr.

21. Filed Motion to shorten time for hearing Motions.

22. Filed Notice of Motion. Hearing on Motions set for February 11.

23. Filed Order setting hearings on Motions for February 11.

2-10-55:

24. Filed Objections and answers to requests for Admissions.

25. Filed Notice of hearing of Objections and Motions pertaining thereto.

26. Filed Order allowing service of Notice and Objections prior to February 10.

27. Filed Subpoena to Produce—Joseph A. Siciliano.

28. Filed Dep. subpoena to testify—Henry Diza.

29. Filed Notice of Taking of Deposition of Defendant, Siciliano.

30. Filed Notice of Taking of Deposition of Defendant, American Pacific Dairy Products.

31. Filed Affidavit of Service of copy of Notice of Taking of Deposition—Siciliano.

32. Filed Affidavit of Service of copy of Notice of Taking of Deposition—Diza.

2-17-55:

Trial: Evidence taken; filed Plaintiff's Exhibits 1, 2, and 3. Plaintiff rested. Taking of evidence continued until 5 p.m. Court recessed until February 18 at 1:30 p.m.

2-18-55:

33. Filed Subpoena to Produce, etc.—Joseph A. Siciliano.

Trial Resumed: Evidence taken on behalf of defendant and at conclusion of which defense rested. At conclusion of all evidence, Court found issues joined for plaintiff as against defendant and Court directed attorney for plaintiff to prepare Judgment in favor of plaintiff in the sum of \$6,534.55. Execution of judgment stayed for thirty (30) days. Court ordered that Mr. Norman Thompson, trustee, be permitted to take out any exhibits in Civil Nos. 59-54 and 68-54 he may need in connection with the operation of the business.

Mr. Thompson withdrew Plaintiff's Exhibits G, J, K, and L of Civil No. 59-54.

2-28-55:

34. Filed Judgment.

3-19-55:

35. Filed Notice of Appeal.

36. Filed Bond for Costs on Appeal.

3-22-55:

37. Filed copy of notice to attorney for plaintiff of filing of appeal.

4-14-55:

38. Filed plaintiff's Memo of Costs and Disbursements.

4-16-55:

39. Filed Motion for fixing amount of Supersedeas Bond.

4-19-55:

40. Filed Supersedeas Bond in amount of \$7,000.00. Approved by Court.

4-21-55:

41. Filed Motion to extend time for perfecting appeal to June 10th. Approved and so ordered by Court.

4-25-55:

42. Costs to be taxed on April 29. Attorneys notified.

4-29-55:

Forthwith hearing re setting on hearing re tax of costs. Hearing set for May 6.

5-6-55:

Hearing re Tax of Costs. Attorneys present. By agreement clerk ordered to tax costs in the sum of \$46.00.

Costs taxed in sum of \$46.00.

6-7-55:

43. Filed defendant's motion and Court Order extending for 15 days the time within which to docket and file record on appeal.

6-20-55:

44. Filed Statement of Points on which Appellant Intends to Rely.

45. Filed Designation of contents of Record on Appeal.

46. Filed Court Reporter's Transcript of Proceedings.

(A true copy.)

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[Title of District Court and Cause.]

### MINUTES

11-26-54:

Defendant, American Pacific Dairy Products, Inc., only, having this day filed Special Appearance, Motion to Dismiss, Motion for Change of Venue, Motion for more Definite Statement, and Motion to Strike, Ordered hearing on said motions had on Friday, December 10, 1954, at 9:30 a.m.

12-10-54—Hearing:

Plaintiff appears by Robert E. Duffy, its attorney.

Defendant, American Pacific Dairy Products, Inc., appears by Finton J. Phelan, Jr., its attorney.

Having heard the arguments of the attorneys for the respective parties on the motions before the court, Ordered all motions be and are denied. Defendant given twenty (20) days in which to file its answer.

1-21-55—Forthwith Hearing:

Plaintiff appears by John A. Bohn, its attorney.

Defendant appears by Finton J. Phelan, Jr., its attorney.

By oral agreement between attorneys, Ordered Pretrial Conference set for Wednesday, January 26, 1955, at 9:30 a.m.

1-26-55—Pretrial Conference:

Plaintiff appears by John A. Bohn, its attorney.

Defendant, American Pacific Dairy Products, Inc., appears by Finton J. Phelan, Jr., its attorney.

Case consolidated with Civil 59-54 and set for trial Monday, February 14, 1955, at 9:30 a.m. Pretrial order to be filed.

2-10-55—Ordered:

Hearings on all motions filed on February 9th and 10th be had on Friday, February 11, 1955, at 9:30 a.m.

2-11-55—Hearing on Motions:

Having heard arguments of the attorneys for the respective parties, the Court Ordered that the following questions in the Request for Ad-

mission of Facts, filed February 2, 1955, should be answered: 1, 7, 8, 10, 11, 12, 13, 14, and 15.

2-17-55—Trial:

Plaintiff appeared by Joseph Siciliano and with John A. Bohn, its attorney.

Defendant appeared by Edward Thompson and with Finton J. Phelan, Jr., its attorney.

Thereupon came the evidence on behalf of the plaintiff and certain documents marked Plaintiff Exhibits 1, 2, and 3 were offered in evidence, objected to, and were accepted over the objection and filed. By agreement of counsel for the respective parties, the Court inspected the addition to the Dairy Queen Building during the noon recess. Certain persons, namely, Edward Thompson, Joseph Siciliano, Albert B. Padua, Ernesto O. Diza, and Joseph Meggo were duly sworn and testified. At the conclusion of the evidence the plaintiff rested. Taking of evidence continued until the hour of 5:00 o'clock p.m. Court recessed until the following day, Friday, February 18, 1955, at the hour of 1:30 o'clock p.m.

2-18-55—Trial Resumed:

All parties present as heretofore. Thereupon came the evidence on behalf of the defendant and certain persons, namely, Edward Thompson and Norman Thompson were duly sworn and testified. At the conclusion of the evidence, the defense rested. At the conclusion of all the evidence, the Court found issues joined for the

plaintiff as against the defendant and the Court directed the attorney for the plaintiff to prepare Judgment in favor of the plaintiff in the sum of Six Thousand Five Hundred Thirty-four Dollars and Fifty-five Cents (\$6,534.55). The execution of the judgment is stayed for thirty (30) days.

The Court Ordered that Mr. Norman Thompson, trustee, be permitted to take out any exhibits in Civil Nos. 59-54 and 68-54 he may need in connection with the operation of the business.

Mr. Thompson withdrew Defendant Exhibits G, J, K, and L of Civil No. 59-54.

#### 4-29-55—Forthwith Hearing for Resetting:

Plaintiff appeared by J. J. Novak, its attorney.

Defendant appeared by Finton J. Phelan, Jr., its attorney. Having heard the attorneys for the respective parties, the Court Ordered that hearing for the purpose of determining costs be set for Friday, May 6, 1955, at 9:30 a.m.

#### 5-6-55—Hearing of Taxation of Costs:

Plaintiff appears by J. J. Novak, his attorney.

Defendant appears by Finton J. Phelan, Jr., his attorney.

By agreement between attorneys the clerk is directed to tax costs in the sum of forty-six dollars (\$46.00).

(A true copy.)



[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, with attached exhibits, filed November 4, 1954.

2. Special appearance and motion to Dismiss, filed November 26, 1954.

3. Motion for Change of Venue on the ground of convenience of parties and witnesses in the interest of Justice, filed, November 26, 1954.

4. Motion for more definite statement and Motion to strike, filed November 26, 1954.

5. Answer and Cross-Complaint, filed December 28, 1954.

6. Reply to the Counterclaim, filed January 19, 1955.

7. Answer to Cross-Claim, filed January 19, 1955.

8. Pretrial Order, filed January 26, 1955.

9. Request for admission of facts, filed February 2, 1955.

10. Demand for Jury Trial, filed February 9, 1955.

11. Motion for Severance, filed February 9, 1955.

12. Objections and Answers to Requests for Admissions, filed February 10, 1955.

13. Judgment, filed February 28, 1955.
14. Notice of Appeal, filed March 19, 1955.
15. Bond for costs on appeal, filed March 19, 1955.
16. Motion for stay, filed April 16, 1955.
17. Supersedeas Bond, filed April 19, 1955.
18. Statements of Points on which Appellant intends to Rely, filed June 20, 1955.
19. Designation of contents of Record on Appeal, filed June 20, 1955.
20. Plaintiff's Exhibit No. I, filed February 17, 1955.
21. Plaintiff's Exhibit No. II, filed February 17, 1955.
22. Plaintiff's Exhibit No. III, filed February 17, 1955.
23. Certified copy of the Docket entries.
24. Certified copy of the Clerk's Minutes.
25. Court Reporter's Transcript of Proceedings.

are the original or certified copies of the original documents filed in the office of the clerk in the above-entitled case.

I do hereby further certify that a certain document entitled "Findings of Facts and Conclusions of Law," being Item No. 11 of the Designation of Contents of record on Appeal, has never been filed in my office and is not now among the records of the above-captioned case.



In the United States Court of Appeals  
for the Ninth Circuit

Nos. 14805 and 14806

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC., a Corporation,

Defendant-Appellant,

vs.

JOSEPH A. SICILIANO,

Plaintiff-Appellee.

and

AMERICAN PACIFIC DAIRY PRODUCTS,  
INC.,

Defendant-Appellant,

vs.

PACIFIC ENTERPRISES, INC.,

Plaintiff-Appellee.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY AND  
DESIGNATION OF THE RECORD TO  
BE PRINTED

Appellant in the above-entitled causes hereby adopts as its statement of points on which it intends to rely in this appeal the statement of points as they now appear in the transcript of the records filed herein.

Appellant hereby designates for printing the entire certified transcript of the records save and except that portion which covers the exhibits.

Dated this 1st day of July, 1955.

/s/ BURLMAN ADAMS, of

LITTLE, LeSOURD, PALMER,  
SCOTT & SLEMMONS,  
Attorneys for Appellant.

FINTON J. PHELAN, JR.,  
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 10, 1955.

